

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

The State of Nevada State Engineer; et al.,  
Appellants  
vs.  
Eureka County; et al.,  
Respondents

No. 70157

DOCKETING STATEMENT  
CIVIL APPEALS

Electronically Filed  
May 05 2016 08:46 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

## GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

## WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Seventh Department II  
County Eureka Judge Fairman  
District Ct. Case No. CV-1108-155 and consolidated cases.

**2. Attorney filing this docketing statement:**

Attorney David H. Rigdon, Esq. Telephone 775-882-9900  
Firm Taggart & Taggart, Ltd.  
Address 108 N. Minnesota St.  
Carson City, NV 89703

Client(s) Kobeh Valley Ranch, LLC

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Kristen A. Peterson, Esq. Telephone 775-687-0202  
Firm Allison, MacKenzie, Pavlakis, Wright & Fagan, Ltd.  
Address 402 N. Division St.  
P.O. Box 646  
Carson City, NV 89703

Client(s) Eureka County

Attorney Theodore Beutel, Esq. Telephone 775-237-5315  
Firm Eureka County District Attorney  
Address 701 S. Main St.  
P.O. Box 190  
Eureka, NV 89316

Client(s) Eureka County

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |  |   |
|--|---|
| <input type="checkbox"/> Judgment after bench trial                | <input type="checkbox"/> Dismissal:                                     |
| <input type="checkbox"/> Judgment after jury verdict               | <input type="checkbox"/> Lack of jurisdiction                           |
| <input type="checkbox"/> Summary judgment                          | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                          | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief         | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction                | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief        | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Eureka County, et al. v. The State of Nevada State Engineer, et al. Case No. 61324

Michel and Margaret Ann Etcheverry family, LP, et al. v. State Engineer of Nevada, Office of the State Engineer, et al. Case No.63258

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

See Attachment

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

This is an appeal of Judge Fairman's March 9, 2015 Order Granting Objection to Proposed Order Remanding to State Engineer; Order Granting Petitions for Judicial Review; and Order Vacating Permits. The Order denies Kobeh Valley Ranch's request to remand the case to the State Engineer for further proceedings and vacates water right permits issued to Kobeh Valley by the State Engineer.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Did the district court err when it interpreted the Supreme Court Opinion in Case Nos. 61324 and 63258 as prohibiting the district court from remanding the case to the State Engineer for further fact-finding proceedings?

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

A similar appeal was filed by the State Engineer which was docketed under the same case number as Kobeh Valley Ranch's appeal.

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained in the Supreme Court pursuant to subparagraph (9) of NRAP 17 since it is an appeal of an administrative agency appeal involving water rights.

**14. Trial.** If this action proceeded to trial, how many days did the trial last? \_\_\_\_\_

Was it a bench or jury trial? \_\_\_\_\_

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?  
No.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** March 9, 2016

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**17. Date written notice of entry of judgment or order was served** March 14, 2016

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☒ NRCP 59      Date of filing March 28, 2016

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion The motion is pending

(c) Date written notice of entry of order resolving tolling motion was served N/A

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** April 13, 2016

---

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:  
The State Engineer filed its Notice of Appeal on April 8, 2016.

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)

---

**SUBSTANTIVE APPEALABILITY**

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- |  |                                       |
|--|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1)  | <input type="checkbox"/> NRS 38.205   |
| <input type="checkbox"/> NRAP 3A(b)(2)   | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3)   | <input type="checkbox"/> NRS 703.376  |
| <input checked="" type="checkbox"/> Other (specify) <u>NRAP 17(a)(9); NRS 533.450(9)</u> |                                       |
- 

(b) Explain how each authority provides a basis for appeal from the judgment or order:  
This is an appeal from a final judgment of the district court and is therefore appealable pursuant to NRAP 3(A)(b)(1). This is also an appeal involving a decision of the Nevada State Engineer. Appeals may be taken to the Supreme Court from district court decisions that review decisions of the State Engineer. NRS 533.450(9), NRAP 17(a)(9).

**22. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

The Nevada State Engineer and Kobeh Valley Ranch, LLC (Appellants)  
Eureka County; Michel and Margaret Ann Etcheverry Family, LP; Diamond  
Cattle Company, LLC; Conely Land and Livestock, LLC; Lloyd Morrision; and  
Kenneth F. Benson (Respondents)

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Respondents' claim was that the State Engineer's Order 6127 was arbitrary, capricious, and not supported by law.

Appellants opposed Petitioner's assertions.

The formal date of disposition for all claims is March 9, 2016, the notice of entry was served on March 14, 2016.

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

**27. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Kobeh Valley Ranch, LLC

Name of appellant

May 4, 2016

Date

David H. Rigdon, Esq.

Name of counsel of record



Signature of counsel of record

Carson City, NV

State and county where signed

## CERTIFICATE OF SERVICE

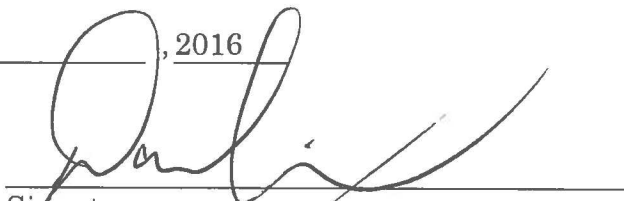
I certify that on the 4<sup>th</sup> day of May, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Karen A. Peterson, Esq.  
Theodore Beutel, Esq.  
Ross E. De Lipkau, Esq.  
Dale E. Ferguson, Esq.  
Gordon H. Depaoli, Esq.  
Micheline Fairbank, Esq.  
Laura A. Schroeder, Esq.  
Therese A. Ure, Esq.

Dated this 4<sup>th</sup> day of May, 2016

  
Signature

Case Title: *The State of Nevada State Engineer, et. al. v. Eureka County, et. al.*

Case No.: 70157

**INDEX OF ATTACHMENTS**

<u>Attachment No.</u>	<u>Description</u>
1	Pending and Prior Proceedings in Other Courts, Question 7 of the Docketing Statement
2	Notice of Entry of Amended Order
3	Amended Order
4	Kobeh Valley Ranch, LLC Motion to Alter or Amend Judgment
5	Etcheverry Petition for Judicial Review CV1207-178
6	Benson Petition for Judicial Review CV1202-170
7	Benson Amended Petition for Judicial Review CV1112-165
8	Benson Petition for Judicial Review CV1108-157
9	Eureka County Petition for Judicial Review CV108-15
10	131 Nev. Adv. Op. 84 (2015)

## **Attachment 1**

## **ATTACHMENT 1**

### **7. Pending and Prior Proceedings in Other Courts**

Cases Consolidated in the Seventh Judicial District Court, Department II

Case No. CV1108-155 – Eureka County v. State Engineer, et al.

Case No. CV1108-156 – Conley Land & Livestock, LLC, et al. v. State Engineer, et al.

Case No. CV1108-157 – Kenneth F. Benson, et al. v. State Engineer, et al.

Case No. CV1112-164 – Eureka County v. State Engineer, et al.

Case No. CV1112-165 – Kenneth F. Benson, et al. v. State Engineer, et al.

Case No. CV1202-170 – Kenneth F. Benson, et al. v. State Engineer, et al.

Case No. CV1207-178 – Michel and Margaret Ann Etcheverry Family, LP, et al. v. State Engineer, et al.

All cases were disposed of with the issuance of the March 9, 2016 Amended Order.

## **Attachment 2**

ALLISON MacKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

1 Case Nos. CV1108-155  
2 CV1108-156  
3 CV1108-157  
4 CV1112-164  
5 CV1112-165  
6 CV1202-170  
7 CV1207-178

8 Dept. No. 2

NO. \_\_\_\_\_  
FILED  
MAR 14 2016  
Eureka County Clerk  
By Amerdace

9  
10 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
11  
12 IN AND FOR THE COUNTY OF EUREKA  
13

14 EUREKA COUNTY, a political  
15 subdivision of the State of Nevada,

16 Petitioner,

17 vs.

Case No.: CV1108-155

Dept. No.: 2

18 THE STATE OF NEVADA, EX. REL.,  
19 STATE ENGINEER, DIVISION OF  
20 WATER RESOURCES, and KOBEH  
21 VALLEY RANCH, LLC, a Nevada  
22 limited liability company,

23 Respondents. /

24 CONLEY LAND & LIVESTOCK, LLC, a  
25 Nevada limited liability company; LLOYD  
26 MORRISON, an individual;

27 Petitioners/Plaintiffs,

28 vs.

Case No.: CV1108-156

Dept. No.: 2

29 THE OFFICE OF THE STATE ENGINEER  
30 OF THE STATE OF NEVADA, DIVISION  
31 OF WATER RESOURCES, DEPARTMENT  
32 OF CONSERVATION AND NATURAL  
33 RESOURCES, JASON KING, State Engineer;  
34 KOBEH VALLEY RANCH, LLC, Real Party  
35 in Interest;

36 Respondents/Defendants. /

37 ///

38 ///

39 ///

ALLISON MacKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada Limited Liability Company, and  
4 MICHEL AND MARGARET ANN  
5 ETCHEVERRY FAMILY, LP, a Nevada  
6 Registered Foreign Limited Partnership,

Petitioners,

vs.

Case No.: CV1108-157

Dept. No.: 2

7 STATE ENGINEER, OF NEVADA,  
8 OFFICE OF THE STATE ENGINEER,  
9 DIVISION OF WATER RESOURCES,  
10 DEPARTMENT OF CONSERVATION  
11 AND NATURAL RESOURCES, and  
12 KOBEH VALLEY RANCH, LLC, a  
13 Nevada limited liability company,

Respondents. /

14 EUREKA COUNTY,  
15 a political subdivision of the State of Nevada,

Petitioner,

vs.

Case No.: CV1112-164

Dept. No.: 2

16 THE STATE OF NEVADA, EX. REL.,  
17 STATE ENGINEER, DIVISION OF  
18 WATER RESOURCES, and KOBEH  
19 VALLEY RANCH, LLC, a Nevada  
20 limited liability company,

Respondents. /

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

Petitioners,

vs.

Case No.: CV1112-165

Dept. No.: 2

27 STATE ENGINEER OF NEVADA,  
28 OFFICE OF THE STATE ENGINEER,  
DIVISION OF WATER RESOURCES,  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES, and KOBEH  
VALLEY RANCH, LLC, a Nevada limited  
liability company,

Respondents. /

ALLISON MackENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company, and  
4 MICHEL AND MARGARET ANN  
5 ETCHEVERRY FAMILY, LP, a Nevada  
6 registered foreign limited partnership,

7 Petitioners,

Case No.: CV1202-170

8 vs.

Dept. No.: 2

9 STATE ENGINEER OF NEVADA,  
10 OFFICE OF THE STATE ENGINEER,  
11 DIVISION OF WATER RESOURCES  
12 DEPARTMENT OF CONSERVATION  
13 AND NATURAL RESOURCES,

14 Respondent. /

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

21 Petitioners,

Case No.: CV1207-178

22 vs.

Dept. No.: 2

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

28 Respondent,

AND

29 KOBEH VALLEY RANCH, LLC, a  
30 Nevada limited liability company,

31 Intervenor-  
32 Respondent. /

33 **NOTICE OF ENTRY OF AMENDED ORDER**  
34 **GRANTING OBJECTION TO PROPOSED ORDER REMANDING**  
35 **TO STATE ENGINEER; ORDER GRANTING PETITIONS**  
36 **FOR JUDICIAL REVIEW; ORDER VACATING PERMITS**

37 NOTICE IS HEREBY given that on the 9<sup>th</sup> day of March, 2016, the Court duly  
38 entered an AMENDED ORDER GRANTING OBJECTION TO PROPOSED ORDER

ALLISON MacKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

1 REMANDING TO STATE ENGINEER; ORDER GRANTING PETITIONS FOR JUDICIAL  
2 REVIEW; ORDER VACATING PERMITS in the above-entitled matters. A copy of said  
3 AMENDED ORDER is attached hereto as Exhibit "1".

4 AFFIRMATION

5 The undersigned does hereby affirm that the preceding document DOES NOT  
6 contain the social security number of any person.

7 DATED this 14<sup>th</sup> day of March, 2016.

8  
9 KAREN A. PETERSON, ESQ.  
Nevada State Bar No. 0366  
ALLISON MacKENZIE, LTD.  
402 North Division Street  
Carson City, Nevada 89703

11 ~ and ~

12 EUREKA COUNTY DISTRICT ATTORNEY  
13 701 South Main Street  
14 Post Office Box 190  
Eureka, Nevada 89316

15  
16 BY:

17 THEODORE BEUTEL, ESQ.  
18 Nevada State Bar No. 5222

19 Attorneys for EUREKA COUNTY  
20  
21  
22  
23  
24  
25  
26  
27  
28

ALLISON MacKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

### CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date I caused the foregoing document to be served to all parties to this action by:

☒ Placing a true copy thereof in a sealed postage prepaid envelope, first class mail, in the United States Mail in Carson City, Nevada [NRCP 5(b)(2)(B)]

☐ Via electronic transmission

☐ Hand-delivery [NRCP 5(b)(2)(A)]

Micheline N. Fairbank, Esq.  
Senior Deputy Attorney General  
Attorney General's Office  
100 North Carson Street  
Carson City, NV 89701


Ross E. de Lipkau, Esq.  
John R. Zimmerman, Esq.  
Francis Mark Wikstrom, Esq.  
Parsons Behle & Latimer  
50 West Liberty Street, Suite 750  
Reno, Nevada 89501

Laura A. Schroeder, Esq.  
Therese A. Ure, Esq.  
Schroeder Law Offices, P.C.  
440 Marsh Avenue  
Reno, Nevada 89509

Gordon H. DePaoli, Esq.  
Dale E. Ferguson, Esq.  
Woodburn and Wedge  
6100 Neil Road, Suite 500  
Reno, NV 89511

Courtesy Copy to:  
Honorable Gary D. Fairman  
Seventh Judicial District Court  
P.O. Box 151629  
Ely, NV 89315

DATED this 14<sup>th</sup> day of March, 2016.

  
NANCY FONTENOT

4838-0522-0143, v. 1

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## **Attachment 3**

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Case Nos. CV 1108-155  
CV-1108-156  
CV-1108-157  
CV-1112-164  
CV-1112-165  
CV-1202-170  
CV-1207-178

Dept No. 2

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

MAR 09 2016

Eureka County Clerk

By Alene

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

\*\*\*\*\*

EUREKA COUNTY, a political subdivision  
of the State of Nevada,  
Petitioner,

v.

STATE OF NEVADA, EX. REL., STATE  
ENGINEER, DIVISION OF WATER  
RESOURCES,

Respondent.

CONLEY LAND & LIVESTOCK, LLC, a  
Nevada limited liability company, LLOYD  
MORRISON, an individual,

Petitioners,

v.

OFFICE OF THE STATE ENGINEER OF THE  
STATE OF NEVADA, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES, JASON KING, State Engineer,  
KOBEN VALLEY RANCH, LLC, Real Party in  
Interest,

Respondents.

**AMENDED ORDER  
GRANTING OBJECTION TO  
PROPOSED ORDER REMANDING  
TO STATE ENGINEER; ORDER  
GRANTING PETITIONS FOR JUDICIAL  
REVIEW; ORDER VACATING PERMITS**



1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company, and  
4 MICHEL and MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
registered foreign limited partnership,

Petitioners,

v.

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

Respondent.

10 EUREKA COUNTY, a political subdivision of  
the State of Nevada,

Petitioner,

v.

13 STATE OF NEVADA, EX. REL., STATE  
ENGINEER, DIVISION OF WATER  
RESOURCES,

Respondent.

16 KENNETH F. BENSON, an individual,  
DIAMOND CATTLE COMPANY, LLC, a  
Nevada limited liability company, and  
MICHEL and MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
registered foreign limited partnership,

Petitioners,

v.

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

Respondent.



1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company, and  
4 MICHEL AND MARGARET ANN  
5 ETCHEVERRY FAMILY, LP, a Nevada  
6 registered foreign limited partnership,

7  
8  
9 Petitioners,

10 v.

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

16  
17 Respondent.

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

24  
25 Petitioners,

26 vs.

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

Respondents.

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

Intervenor-Respondents.

On May 20, 2013, petitioners MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, DIAMOND CATTLE COMPANY, LLC and KENNETH F. BENSON appealed this Court's findings of fact, conclusions of law, and order denying petitions for judicial



1 review, entered May 17, 2013 (Nevada Supreme Court case no. 63258). The appeal was  
2 consolidated with the appeal in Nevada Supreme Court case no. 61324 for appellate  
3 purposes. The court reversed and remanded the case for proceedings consistent with the  
4 opinion.<sup>1</sup> The remittitur was issued on November 23, 2015.

5 On November 25, 2015, Kobeh Valley Ranch, LLC ("KVR") via email, submitted to  
6 the court a proposed order remanding to State Engineer; on December 3, 2015, Eureka  
7 County, Kenneth F. Benson, Diamond Cattle Company LLC and Michel and Margaret Ann  
8 Etcheverry Family, L.P. filed a joint objection to proposed orders of Kobeh Valley Ranch,  
9 LLC; on December 7, 2015, Michel and Margaret Ann Etcheverry Family, L.P., Diamond  
10 Cattle Company, LLC and Kenneth Benson ("petitioners") filed an objection to proposed  
11 orders of Kobeh Valley Ranch, LLC; on December 16, 2015, KVR filed its reply to joint  
12 objection to proposed orders of Kobeh Valley Ranch LLC; on December 15, 2015,  
13 respondent Jason King, P.E., the State Engineer, filed his joinder to Kobeh Valley Ranch,  
14 LLC's reply to joint objection to proposed orders; on January 8 and 12, 2016, petitioners  
15 filed a request for review of objection to proposed orders of Kobeh Valley Ranch, LLC; the  
16 court has reviewed the pleadings and finds that no further briefing or hearing is  
17 necessary.<sup>2</sup>

18 The court has reviewed the Nevada Supreme Court's opinion issued October 29,  
19 2015. The Nevada Supreme Court held that "substantial evidence does not support the  
20 State Engineer's finding that KVR would be able to "adequately and fully" mitigate the fact  
21 that its ground water appropriations will cause Kobeh Valley springs that sources existing  
22 rights to cease to flow."<sup>3</sup> The court further held that "The State Engineer's decision to  
23

24 <sup>1</sup>Eureka County v. State Engineer, 131 Nev. Adv. Opn. 84 (2015).

25 <sup>2</sup>7JDCR 11.

26 <sup>3</sup>Eureka County v. State Engineer at 16.



1 grant KVR's applications when the result of appropriations would conflict with existing  
2 rights and based upon unsupported findings that mitigation would be sufficient to rectify  
3 the conflict violates the Legislature's directive that the State Engineer must deny use or  
4 change applications when the use or change would conflict with existing rights."<sup>4</sup> Having  
5 found petitioners had met their burden to show the State Engineer's decision was  
6 incorrect, the court held "the State Engineer's decision to grant KVR's applications cannot  
7 stand."<sup>5</sup> The court reversed and remanded these cases to the district court for further  
8 proceedings consistent with this opinion.<sup>6</sup>

9 The Nevada Supreme Court did not remand the cases to the State Engineer for  
10 further proceedings consistent with its opinion which it could have done if the court  
11 concluded additional administrative review and findings were necessary. Based upon the  
12 Supreme Court's reversal of this Court's order denying petitions for judicial review and the  
13 State Engineer's decision to grant KVR's applications, this Court finds that the petitions  
14 for judicial review filed by the petitioners must be granted.

15 Good cause appearing,

16 IT IS HEREBY ORDERED that the petitions for judicial review filed by petitioners  
17 in the above-captioned proceedings are **GRANTED**. The approval of the monitoring,  
18 management, and mitigation plan, issued by respondent, STATE ENGINEER OF NEVADA  
19 is **VACATED** and applications nos. 72695, 72696, 72697, 72698, 73545, 73546, 73547,  
20 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993,  
21 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005,  
22 76006, 76007, 76008, 76009, 76745, 76746, 76802, 76803, 76804, 76805, 76989, 76990,

23  
24 <sup>4</sup>*Id.*

25 <sup>5</sup>*Id.*


26 <sup>6</sup>*Id.*

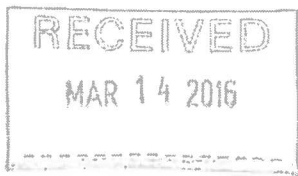


1 77171, 77525, 77526, 77527, 77553, 78424, 79911, 79912, 79913, 79914, 79915, 79916,  
2 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928,  
3 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940,  
4 79941 and 79942 are hereby **DENIED** pursuant to NRS 533.370(2) in accordance with the  
5 holding of the Supreme Court's opinion in 131 Nev. Adv. Opn. 84 issued October 29, 2015.

6 IT IS HEREBY FURTHER ORDERED that the permits issued by the State Engineer  
7 for the above applications are **VACATED**.

8 DATED this 7<sup>th</sup> day of March, 2016.

9   
10 \_\_\_\_\_  
11 DISTRICT JUDGE





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Case Nos. CV 1108-155  
CV-1108-156  
CV-1108-157  
CV-1112-164  
CV-1112-165  
CV-1202-170  
CV-1207-178

Dept No. 2

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

\*\*\*\*\*

EUREKA COUNTY, a political subdivision  
of the State of Nevada,  
Petitioner,

v.

STATE OF NEVADA, EX. REL., STATE  
ENGINEER, DIVISION OF WATER  
RESOURCES,

Respondent.

CONLEY LAND & LIVESTOCK, LLC, a  
Nevada limited liability company, LLOYD  
MORRISON, an individual,

Petitioners,

v.

OFFICE OF THE STATE ENGINEER OF  
THE STATE OF NEVADA, DIVISION OF  
WATER RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES, JASON KING, State  
Engineer, KOBEH VALLEY RANCH, LLC,  
Real Party in Interest,

Respondents.

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

MAR 09 2016

Eureka County Clerk  
By Deanne

CERTIFICATE OF SERVICE



1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company, and  
4 MICHEL and MARGARET ANN  
5 ETCHEVERRY FAMILY, LP, a Nevada  
6 registered foreign limited partnership,

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Petitioners,

v.

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

Respondent.

EUREKA COUNTY, a political subdivision  
of the State of Nevada,

Petitioner,

v.

STATE OF NEVADA, EX. REL., STATE  
ENGINEER, DIVISION OF WATER  
RESOURCES,

Respondent.

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

Petitioners,

v.

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

Respondent.



1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company, and  
4 MICHEL AND MARGARET ANN  
5 ETCHEVERRY FAMILY, LP, a Nevada  
6 registered foreign limited partnership,

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Petitioners,

v.

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

Respondent.

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,

Respondents.

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

Intervenor-Respondents.



The undersigned being an employee of the Eureka County Clerk's Office,  
hereby certifies that on the \_\_\_\_ day of March, 2016, I personally delivered a true and  
correct copy of the following:

***Amended Order Granting Objection to Proposed Order Remanding to State  
Engineer; Order Granting Petitions For Judicial Review; Order Vacating Permits***

addressed to:

Karen A. Peterson, Esq.  
Allison, Mackenzie, Pavlakis, Wright &  
Fagan Ltd.  
P.O. Box 646  
Carson City, Nevada 89701

Dale E. Ferguson, Esq.  
Gordon H. DePaoli, Esq.  
Woodburn and Wedge  
6100 Neil Road, Suite 500  
Reno, Nevada 89511

Theodore Beutel, Esq.  
Eureka County District Attorney  
P.O. Box 190  
Eureka, Nevada 89316

Micheline Fairbank, Esq.  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, Nevada 89701

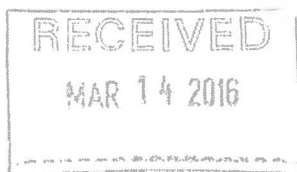
Ross E. De Lipkau, Esq.  
John R. Zimmerman, Esq.  
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Reno, Nevada 89501

Laura A. Schroeder, Esq.  
Therese A. Ure, Esq.  
Schroeder Law Offices, P.C.  
440 Marsh Avenue  
Reno, Nevada 89509

In the following manner:

- |                                     |   |                          |                           |
|-------------------------------------|---|--------------------------|---------------------------|
| <input checked="" type="checkbox"/> | regular U.S. mail   | <input type="checkbox"/> | overnight UPS             |
| <input type="checkbox"/>            | certified U.S. mail   | <input type="checkbox"/> | overnight Federal Express |
| <input type="checkbox"/>            | priority U.S. mail  | <input type="checkbox"/> | Fax to # _____            |
| <input type="checkbox"/>            | hand delivery -   |                          |                           |
| <input type="checkbox"/>            | copy placed in agency box located in the Eureka County Clerk's Office |                          |                           |

Amanda Pearce



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## **Attachment 4**

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NO. \_\_\_\_\_  
FILED  
MAR 25 2016  
Eureka County Clerk  
By Q. Pearce

CASE NOS.: CV-1108-155  
CV-1108-156  
CV-1108-157  
CV-1112-164  
CV-1112-165  
CV-1202-170  
CV-1207-178

DEPT. NO.: II

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

\* \* \*

EUREKA COUNTY, a political subdivision of the  
State of Nevada,

Petitioner,

vs.

STATE OF NEVADA, EX. REL., STATE  
ENGINEER, DIVISION OF WATER  
RESOURCES,

Respondent.

CONLEY LAND & LIVESTOCK, LLC, a Nevada  
limited liability company; LLOYD MORRISON,  
and individual,

Petitioners,

vs.

OFFICE OF THE STATE ENGINEER OF THE  
STATE OF NEVADA, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES, JASON KING, State Engineer,  
KOBEL VALLEY RANCH, LLC, Real Party om  
Interest,

Respondents.

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

Petitioners,

**KOBEL VALLEY RANCH, LLC'S  
MOTION TO ALTER OR AMEND  
JUDGMENT**

1 vs.

2  
3 STATE ENGINEER OF NEVADA, OFFICE OF  
4 THE STATE ENGINEER, DIVISION OF  
5 WATER RESOURCES, DEPARTMENT OF  
6 CONSERVATION AND NATURAL  
7 RESOURCES,

8 Respondent.

9 EUREKA COUNTY, a political subdivision of the  
10 State of Nevada,

11 Petitioner,

12 vs.

13 STATE OF NEVADA, EX. REL., STATE  
14 ENGINEER, DIVISION OF WATER  
15 RESOURCES,

16 Respondent.

17 KENNETH F. BENSON, an individual,  
18 DIAMOND CATTLE COMPANY, LLC, a  
19 Nevada limited liability company, and MICHEL  
20 and MARGARET ANN ETCHEVERRY  
21 FAMILY, LP, a Nevada registered foreign limited  
22 partnership,

23 Petitioners,

24 vs.

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

Respondent.

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

Petitioners,

vs.

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

Respondent.

COMES NOW, Real Party in Interest, KOBEH VALLEY RANCH, LLC (hereinafter  
"KVR"), by and through its attorneys of record, PAUL G. TAGGART, ESQ. and DAVID H.  
RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and, pursuant to NRCP 59(e),  
hereby files this Motion to Alter or Amend this Court's March 9, 2016 Order granting Objection to  
Proposed Order Remanding to State Engineer; Order Granting Petitions for Judicial Review; and  
Order Vacating Permits. This Motion is based on the attached Memorandum of Points and  
Authorities, all papers and pleadings on file in this matter, and any oral argument that this Court may  
permit.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. PROCEDURAL BACKGROUND AND HISTORY

KVR proposes to develop a molybdenum mine, also known as the Mount Hope Mine Project, to be located in Eureka County, Nevada. The Mount Hope Mine Project will be one of the largest primary molybdenum mines in the world. The development and operation of the mine will greatly enhance the economic development efforts of the State of Nevada and provide substantial tax revenue for Eureka County. Almost \$300 million dollars has already been invested in this effort and it is expected that when the mine is operational, it will employ about 400 people in full-time positions. This Court, in its March 9, 2016, order, denied water rights that are required for this project to succeed.

To develop the mine, several water applications were filed with the State Engineer to appropriate new water rights and change the point of diversion, place of use, and/or manner of use of existing water rights (collectively hereinafter “Applications”).<sup>1</sup> The applications sought a total combined duty of 11,300 afa of groundwater for mining and milling purposes associated with the proposed mine. The Applications were protested by various parties including Eureka County.

KVR has expended significant time and resources in pursuit of the Applications, including three separate trips through this Court. In October 2008, the State Engineer conducted five days of hearings on the applications and, six months later, issued a ruling granting most of them. Eureka County and other protesters appealed that determination. This Court subsequently vacated the ruling and remanded the case back to the State Engineer for additional proceedings. The State Engineer conducted a second round of hearings in December 2010 and May 2011. On July 5, 2011 the State Engineer issued Ruling 6127 granting KVR 11,300 afa of groundwater rights. The Ruling was conditioned on the submission of a monitoring, management, and mitigation plan (hereinafter “3M Plan”).

The Protestants again appealed the State Engineer’s grant of the Applications. While the appeal was pending, in October 2011, KVR submitted a draft 3M Plan to the State Engineer. Although 3M Plans are regularly prepared in conjunction with large water rights projects, there is no statute or

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<sup>1</sup> The Applications were filed by a variety of individuals and entities. Those Applications not filed by KVR were later assigned and/or transferred to KVR.

1 regulation which governs the development of such plans. Applicants rely heavily on the direction and  
2 guidance of the State Engineer regarding how a plan should be drafted.

3 Accordingly, during the process of developing the plan, KVR met with the State Engineer to  
4 discuss the draft plan's sufficiency. In reliance on the guidance provided by the State Engineer, KVR  
5 revised the draft 3M Plan and submitted its final plan on May 10, 2012.

6 In June 2012, the State Engineer approved the final 3M Plan. At about the same time, on June  
7 13, 2012, this Court upheld the findings and conclusions of the State Engineer in Ruling 6127. In July  
8 2012, Protestants also appealed the State Engineer's approval of the final 3M Plan to this Court and on  
9 May 15, 2013, this Court upheld the State Engineer's approval of the 3M Plan.

10 This Court's approvals of the State Engineer's determinations were appealed to the Nevada  
11 Supreme Court and the two appeals were consolidated into a single appeal. After briefing and argument,  
12 the Supreme Court reversed and remanded the case to this Court. In the order of reversal and remand,  
13 the Supreme Court specifically declined to answer the question of whether "the State Engineer has  
14 authority to grant an application that conflicts with existing rights based on a determination that the  
15 applicant will be able to mitigate" the conflict.<sup>2</sup> Instead the Supreme Court found that the specific 3M  
16 Plan approved by the State Engineer "is not supported by sufficient evidence that successful mitigation  
17 effort may be undertaken so as to dispel the threat to the existing rights holders."<sup>3</sup>

18 The standards for 3M Plans adopted by the Supreme Court in the decision were unprecedented  
19 and, therefore, unknown to both KVR and the State Engineer at the time the plan was drafted and  
20 approved. Neither KVR nor the State Engineer could have reasonably anticipated that the final 3M Plan  
21 would be required to comply with such standards.

22 On March 9, 2016, this Court entered its Amended Order Granting Objection to Proposed Order  
23 Remanding to State Engineer; Order Granting Petitions for Judicial Review; and Order Vacating  
24 Permits. This Order effectively denies KVR's Applications outright, requires KVR to start over, and  
25 makes it significantly more difficult, expensive, and time-consuming to acquire the water resources

---

27 <sup>2</sup> *Eureka Cnty. v. State Engineer*, 131 Nev.Adv.Op. 84 at 2, 359 P.3d 1114, 1115 (2015).

28 <sup>3</sup> *Id.*

1 needed to develop the mine project.

2 KVR respectfully submits that this Courts March 9, 2016, Amended Order was issued in error  
3 and, pursuant to NRCP 59(e), requests this Court alter or amend the order to allow the case to be  
4 remanded to the State Engineer for the purpose of allowing KVR to submit evidence of its ability to  
5 successfully mitigate conflicts and amend the 3M Plan to bring it into compliance with instructions  
6 provided by the Supreme Court.

7 **II. STANDARD OF REVIEW**

8 NRCP 59(e) authorizes a party to file a motion requesting alteration or amendment of a judgment  
9 within "10 days after service of written notice of entry of the judgment." Notice of Entry of Judgment in  
10 this matter was filed on March 14, 2016. Since Rule 59(e) does not provide standards for granting a  
11 motion to alter or amend a judgment, a district court enjoys considerable discretion in granting or  
12 denying a Rule 59(e) motion.<sup>4</sup> A district court's decision to grant or deny a motion for reconsideration is  
13 reviewed under an abuse of discretion standard.<sup>5</sup> "A district court may properly reconsider its decision if  
14 it (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was  
15 manifestly unjust, or (3) if there is an intervening change in controlling law."<sup>6</sup>

16 KVR respectfully submits that the March 9, 2016 order was issued in error and is manifestly  
17 unjust in that it fails to allow KVR an adequate opportunity to amend the 3M Plan to render it compliant  
18 with the newly articulated and wholly unprecedented standards adopted by the Nevada Supreme Court.

19 **III. ARGUMENT**

20 A. **This Court erroneously concluded that the Supreme Court would have remanded**  
21 **this case directly to the State Engineer if it had intended for further proceedings**  
22 **to occur before the State Engineer.**

23 This Court stated that "[t]he Nevada Supreme Court did not remand the cases to the State Engineer  
24 for further proceedings consistent with its opinion which it could have done if the court concluded  
25 additional administrative review and findings were necessary." However, the Supreme Court is not

26  
27 <sup>4</sup> *Stevo Design, Inc. v. SBR Marketing Ltd.*, 919 F.Supp.2d 1112, 1117 (D. Nev. 2013).

28 <sup>5</sup> *Smith v. Clark County School Dist.*, 737 F.3d 950, 954 (9th Cir., 2013).

<sup>6</sup> *Id.* at 955 (internal quotations and citations omitted).

1 empowered to remand issues directly to the State Engineer.<sup>7</sup> Instead, in administrative appeals,  
2 particularly when the Supreme Court wants an administrative agency to take substantive action consistent  
3 with its instructions, the Supreme Court remands to a district court for that court to then remand to the  
4 administrative agency.<sup>8</sup>

5 Given this long-standing practice, it would be quite extraordinary for the Supreme Court to  
6 bypass a district court and remand a case directly to the State Engineer. When the Supreme Court  
7 remanded this case back to this Court it did so for the purpose of having the Court conduct or order  
8 “proceedings consistent with this order.”<sup>9</sup> Since a district court is only empowered by NRS 533.450 to  
9 review the fact-finding proceedings conducted by the State Engineer, and not to conduct its own fact-  
10 finding proceedings in the matter, an order for remand to the district court is effectively an order  
11 requiring the district court to further remand the issue to the State Engineer for additional fact-finding.

12 In addition, the statement in the Supreme Court decision that “the State Engineer’s decision to  
13 grant KVR’s applications cannot stand” must be read within its proper context.<sup>10</sup> The Supreme Court  
14 did not find that no 3M Plan can ever provide substantial evidence for a finding that impacts from  
15 proposed pumping can be fully mitigated. It only held that this particular 3M Plan did not provide such  
16 substantial evidence. This is the context for the quote.

17 What the Supreme Court effectively said was that if this particular 3M Plan is the only  
18 substantial evidence supporting the State Engineer’s determination, that determination cannot be upheld.  
19 This opens the door for the development and implementation of a different 3M Plan on remand that  
20 could provide substantial evidence supporting the State Engineer’s approval of the permits. Given the  
21 enormous negative economic impacts that will result from a complete denial of KVR’s Applications,  
22 KVR urges this Court to give it the opportunity to develop such a plan and provide evidence of its ability

23  
24 <sup>7</sup> See *Town of Eureka v. Office of State Engineer*, 108 Nev. 163, 169-70, 826 P.2d 948, 952 (1992)(remanding case to district  
25 court for referral to the State Engineer to conduct further proceedings); *Application of Fillipini*, 66 Nev. 17, 31, 202 P.2d 535,  
26 541-41 (1949)(remanding to the district court issues concerning whether and to what extent an application would injure  
27 appellant); *Revert v. Ray*, 95 Nev. 782, 788, 603 P.2d 262, 265 (1979)(reversing and remanding to district court for further  
28 proceedings by State Engineer.); *Great Basin Water Network v. State Eng’r*, \_\_\_ Nev. \_\_\_, \_\_\_, 234 P.3d 912, 920  
(2010)(reversing and remanding case to district court for further remand to State Engineer to conduct further proceedings).

<sup>8</sup> *Id.*

<sup>9</sup> *Eureka Cnty. v. State Engineer*, 131 Nev.Adv.Op. 84 at 16, 359 P.3d 1114, 1121 (2015).

<sup>10</sup> *Id.*

1 to successfully mitigate conflicts without requiring it to start over.

2 B. KVR reasonably relied on the State Engineer's direction regarding the  
3 development of the 3M Plan.

4 The Nevada Supreme Court has held that "the State Engineer has been charged with the statutory  
5 duty of administering the complex system of water rights within the state. We believe that *lay members*  
6 *of the public are entitled to rely upon its advice as to the procedures to be followed under the state water*  
7 *law.*"<sup>11</sup> As noted above, Nevada currently has no statute or regulation governing the development,  
8 amendment, and implementation of 3M Plans. Accordingly, applicants who are required to submit such  
9 plans must rely solely on the direction and guidance of the State Engineer as to what elements must be  
10 included within such plans and what standards will be used to review a plan.

11 In accordance with the requirements of Ruling 6127, KVR submitted a draft 3M Plan for the  
12 State Engineer to review and provide feedback.<sup>12</sup> A meeting was held between KVR and the State  
13 Engineer for the specific purpose of receiving input from the State Engineer regarding the sufficiency of  
14 the plan.<sup>13</sup> Based on this guidance, KVR made revisions and submitted a final 3M Plan to the State  
15 Engineer for approval.<sup>14</sup> In addition, throughout the development of the plan, KVR consulted with  
16 Eureka County and other Protestants to ensure that their concerns would be fully addressed.<sup>15</sup> The final  
17 3M Plan was approved by the State Engineer after more than a year of cooperation and collaboration  
18 between KVR, the State Engineer, and the Protestants.

19 KVR's reliance on the State Engineer's advice and guidance as to the sufficiency of the 3M Plan  
20 was reasonable given the fact that there was no statute, regulation, or precedential case law which  
21 provided alternative direction as to what the plan should include or what standards would guide its  
22 approval. In good-faith reliance on the State Engineer's advice, KVR diligently pursued the  
23 development of the 3M Plan using the best resources available to it at the time. The Nevada Supreme  
24 Court has clearly directed that an applicant "cannot be punished for the State Engineer's failure to follow

25  
26 <sup>11</sup> *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997)(emphasis added).

27 <sup>12</sup> State Engineer Record on Appeal (hereinafter "ROA") 295-335.

28 <sup>13</sup> ROA 354-376.

<sup>14</sup> *Id.*

<sup>15</sup> See ROA 54-167, 178, 181, 195-196, 204, 207-208, 214, and 227-241.

1 his statutory duty.”<sup>16</sup> The Supreme Court’s finding that the State Engineer failed to meet his statutory  
2 duty in approving the 3M Plan and the associated permits should not result in KVR being punished with  
3 the vacation of the permits. Rather, this Court should remand the case to the State Engineer to allow  
4 KVR to revise the 3M Plan to conform to the Supreme Court’s newly adopted standards.

5 C. **The decision of the Nevada Supreme Court articulated new and unprecedented**  
6 **standards for the development of 3M Plans.**

7 Prior to the Supreme Court’s decision, there was no statute, regulation, or case law that  
8 articulated the standards for approval of a 3M Plan developed in conjunction with an application to  
9 appropriate water. The adoption by the Supreme Court of the standard of review for 3M Plans is new  
10 and wholly unprecedented. There is simply no way that KVR could have known the standard that the  
11 Supreme Court would apply to its review of the plan before the rendering of the decision. If the State  
12 Engineer and KVR had known the Supreme Court would require a 3M Plan to be part of the original  
13 approval or to include more specific mitigation evidence, KVR would have done it. KVR should be  
14 given the opportunity to do that now.

15 This Court, on two prior occasions [Judges Papez and Thompson] affirmed the actions taken by  
16 the State Engineer. Given this, it is manifestly unjust to vacate the Permits before providing KVR an  
17 opportunity to amend the plan in a manner that will bring it into conformance with the Supreme Court’s  
18 directive.

19 D. **This Court’s vacation of the KVR’s permits is manifestly unjust.**

20 The denial of KVR’s Applications, as required by this Court’s Order, will have significant  
21 economic ramifications for the State of Nevada. KVR may lose the priority position of the Applications  
22 for the remaining water in Kobeh Valley. In the time since KVR’s Applications were filed, numerous  
23 entities, including Eureka County, have filed new applications to appropriate the groundwater sought by  
24 KVR. If KVR’s applications are denied, the water associated with those applications will be made  
25 available to these later-filed applications. This is a manifestly unjust result. A project of great economic  
26 significance to the State of Nevada should not be placed in jeopardy based on a failure of the 3M Plan to

27  
28 <sup>16</sup> *Great Basin Water Network v. State Eng’r*, \_\_\_ Nev. \_\_\_, \_\_\_, 234 P.3d 912, 920 (2010).

1 conform to a post-hoc standard articulated by the Supreme Court. Rather, KVR should be given a fair  
2 opportunity to draft a plan that complies with the ruling of the Supreme Court before they are summarily  
3 denied.

4 **IV. CONCLUSION**

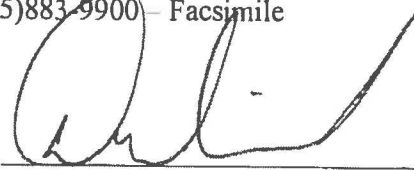
5 For the reasons stated above, KVR respectfully requests this Court amend its Order to allow the  
6 case to be remanded to the State Engineer for the purpose of providing KVR the opportunity to  
7 address the issues raised by the Supreme Court and amend the 3M Plan to bring it into compliance  
8 with the standards articulated the Supreme Court.

**AFFIRMATION**  
**Pursuant to NRS 239B.030**

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

DATED this 25<sup>th</sup> day of March, 2016.

TAGGART & TAGGART, LTD.  
108 North Minnesota Street  
Carson City, Nevada 89703  
(775)882-9900 – Telephone  
(775)883-9900 – Facsimile

By:   
PAUL G. TAGGART, ESQ.  
Nevada State Bar No. 6136  
DAVID H. RIGDON, ESQ.  
Nevada State Bar No. 13567  
Attorneys for Real Party in Interest

Taggart & Taggart, Ltd.  
108 North Minnesota Street  
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(775)882-9900 – Telephone  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date, I served or caused to be served, a true and correct copy of the foregoing KOBEH VALLEY RANCH, LLC'S MOTION TO ALTER OR AMEND JUDGMENT by:

☒ By **U.S. POSTAL SERVICE**: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

Karen A. Peterson, Esq.  
Allison, Mackenzie, Pavlakis, Wright &  
Fagan, Ltd.  
P.O. Box 646  
Carson City, NV 89701

Dale E. Ferguson, Esq.  
Gordon H. DePaoli, Esq.  
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6100 Neil Rd., Suite 500  
Reno, NV 89511

Theodore Beutel, Esq.  
Eureka County District Attorney  
P.O. Box 190  
Eureka, NV 89316

Micheline Fairbank, Esq.  
Nevada Attorney General's Office  
100 N. Carson St.  
Carson City, NV 89701

Ross E. De Lipkau, Esq.  
Parsons, Behle & Latimer  
50 West Liberty St., Suite 750  
Reno, NV 89501

Laura A. Schroeder, Esq.  
Therese A. Ure, Esq.  
Schroeder Law Offices, P.C.  
440 Marsh Ave.  
Reno, NV 89509

☐ By **U.S. CERTIFIED, RETURN RECEIPT POSTAL SERVICE**: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

☐ By **ELECTRONIC DELIVERY**, via:

DATED this 25<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
Employee of TAGGART & TAGGART, LTD.

## **Attachment 5**

NO. \_\_\_\_\_  
FILED  
JUL 05 2012  
Eureka County Clerk  
By B. Conley

1 CASE NO.: CV 1207-178  
2 DEPT. NO.: 2  
3 SCHROEDER LAW OFFICES, P.C.  
4 Laura A. Schroeder, Nevada State Bar #3595  
5 Therese A. Ure, Nevada State Bar #10255  
6 440 Marsh Ave.  
7 Reno, Nevada 89509-1515  
8 PHONE: (775) 786-8800, FAX: (877) 600-4971  
9 counsel@water-law.com  
10 *Attorneys for the Petitioners*

11 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
12  
13 IN AND FOR THE COUNTY OF EUREKA

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

20  
21 Petitioners,

22 v.

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

Respondent.

PETITION FOR JUDICIAL REVIEW

COME NOW Petitioners MICHEL AND MARGARET ANN ETCHEVERRY  
FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON  
(collectively referred to herein as "Petitioners"), by and through their attorneys of record,  
Schroeder Law Offices, P.C., and file this petition for judicial review of the STATE  
ENGINEER's decision dated June 6, 2012 approving a monitoring, measurement, and mitigation  
plan relating to STATE ENGINEER Ruling No. 6127.



Petitioners petition and allege as follows:

## **JURISDICTION AND PARTIES**

1. Michel and Margaret Ann Etcheverry Family LP (“Etcheverry LP”), a foreign limited partnership registered in Nevada, is a landowner, agricultural operator and water right holder in Kobeh Valley and Diamond Valley, Nevada.

2. Diamond Cattle Company, LLC (“Diamond Cattle”), a Nevada limited liability company, is an agricultural operator in Diamond Valley and Kobeh Valley, Nevada, whose managing members include Mark and Martin Etcheverry. Martin Etcheverry is also a general partner in Michel and Margaret Ann Etcheverry Family LP.

3. Kenneth F. Benson (“Benson”) is a water right holder and agricultural operator in Diamond Valley, Nevada.

4. Respondent NEVADA STATE ENGINEER (“STATE ENGINEER”) is an agent of the State of Nevada who, together with the Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, regulates the water use in the State.

5. A Notice of this Petition has been or will be served on the STATE ENGINEER and on all known persons affected by permits issued in relation to STATE ENGINEER Ruling No. 6127, and subsequent acceptance of the Monitoring, Management, and Mitigation Plan (“3M Plan”) of the STATE ENGINEER pursuant to NRS 533.450(3).

6. This Court has jurisdiction to address this petition under NRS 533.450.

7. Venue is proper under NRS 533.450. The water use in the 3M Plan is related to uses appurtenant to lands in Eureka County.

8. Petitioners have exhausted their administrative remedies.

///

///

///



1 **BACKGROUND**

2 9. Between May of 2005 and June of 2010, numerous applications to appropriate  
3 underground water and to change the point of diversion, place of use, and/or manner of use were  
4 filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively herein the  
5 "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to  
6 Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for a proposed  
7 molybdenum mine, known as the Mount Hope Mine Project, requiring underground water for  
8 mining and milling and dewatering purposes.

9 10. The Applications, a combination of applications for new appropriations of water  
10 and applications to change the point of diversion, place of use, and/or manner of use of existing  
11 water uses (applications, permits and/or certificates), requested a total combined duty under all  
12 of the Applications of 11,300 acre feet annually (afa).

13 11. On July 15, 2011, the STATE ENGINEER issued Ruling No. 6127 granting the  
14 majority of the Applications subject to certain terms and conditions. Ruling No. 6127 found that  
15 water rights on springs and streams within the Kobeh Valley could potentially be impacted by  
16 drawdown of the water table. Approval of the Kobeh Valley Ranch Applications was  
17 conditioned upon submission and approval of a monitoring, management, and mitigation plan  
18 ("3M Plan") prior to diverting any water under the Kobeh Valley Ranch Applications. State  
19 Engineer Ruling No. 6127 at 21-22.

20 12. On August 11, 2011, Petitioners filed their Petition for Judicial Review before this  
21 Court, challenging STATE ENGINEER Ruling No. 6127 (Case No. CV-1108-157). As the  
22 STATE ENGINEER continued to issue permits subsequent to STATE ENGINEER Ruling No.  
23 6127, Petitioners filed additional Petitions for Judicial Review designated as Case Nos. CV-  
24 1112-165 and CV-1202-170. Petitioners' requests for judicial review were subsequently  
25 consolidated with Case Nos. CV-1108-155, CV-1108-156, CV-1112-164 and CV-1112-165.

26 ///



13. On June 13, 2012, this Court rendered its Findings of Fact, Conclusions of Law and Order Denying Petitions for Judicial Review (Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-1112-164, CV-1112-165 and CV-1202-170).

#### DECISION

14. On or about May 30, 2012, Eureka Moly, LLC submitted a Monitoring, Management and Mitigation Plan ("3M Plan") to the STATE ENGINEER. The 3M Plan "applies to proposed groundwater extraction from Kobeh Valley and Diamond Valley for mining process water rights granted in Ruling 6127 of the of the office of the Nevada State Engineer (NSE) dated July 15, 2011."

15. On June 6, 2012, Richard Felling, Chief of the Hydrology Section of the Division of Water Resources, communicated to Eureka Moly, LLC that "[t]he Plan as submitted is approved with the understanding that components of the Plan are subject to modification based need, prior monitoring results, or changes in the approved water rights." See Exhibit 1.

#### AGENCY ERROR(S)

16. The STATE ENGINEER manifestly abused his discretion by approving a 3M Plan which contravenes the conditions expressed in STATE ENGINEER Ruling No. 6127.

17. By approving the 3M Plan, the STATE ENGINEER exceeded his statutory authority under NRS 533.370 by allowing the use of water absent *express* conditions that will protect the rights of existing appropriations and mitigate conflicts with existing rights.

18. The STATE ENGINEER's approval of the 3M Plan fails to include findings of fact or conclusions of law demonstrating that under NRS 534.110, existing appropriations can be satisfied pursuant to express conditions included within the 3M Plan.

19. The STATE ENGINEER's approval of the 3M Plan is in error because the 3M Plan fails to bind the current water right holder and Applicants under Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-1112-164, CV-1112-165 and CV-1202-170.

///





1 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919,  
2 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930,  
3 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941,  
4 79942, and 78424 until a 3M Plan is submitted that satisfactorily provides express  
5 conditions for monitoring and mitigating conflicts with existing rights.

6 3. Award such other and further relief as the Court deems just and proper.  
7

8 DATED this 3rd day of July, 2012.

SCHROEDER LAW OFFICE, P.C.

9  
10 

11 Laura A. Schroeder, NSB #3595

12 Therese A. Ure, NSB #10255

13 440 Marsh Ave.

14 Reno, NV 89509

15 PHONE: (775) 786-8800

16 FAX: (877) 600-4971

17 Email: [counsel@water-law.com](mailto:counsel@water-law.com)

18 *Attorneys for the Petitioners*  
19  
20  
21  
22  
23  
24  
25  
26



**AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
**PETITION FOR JUDICIAL REVIEW** does not contain the social security number of any  
person.

DATED this 3rd day of July, 2012.

SCHROEDER LAW OFFICE, P.C.



Laura A. Schroeder, NSB #3595

Therese A. Ure, NSB #10255

440 Marsh Ave.

Reno, NV 89509

PHONE: (775) 786-8800

FAX: (877) 600-4971

Email: [counsel@water-law.com](mailto:counsel@water-law.com)

*Attorneys for Petitioners*



## **Attachment 6**

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

FEB 02 2012

Eureka County Clerk  
By *Joanna M. Cantrell*

CASE NO.: CV1202-170  
DEPT. NO.: 2  
SCHROEDER LAW OFFICES, P.C.  
Laura A. Schroeder, Nevada State Bar #3595  
Therese A. Ure, Nevada State Bar #10255  
Cortney D. Duke, Nevada State Bar #10573  
440 Marsh Ave.  
Reno, Nevada 89509-1515  
PHONE: (775) 786-8800, FAX: (877) 600-4971  
[counsel@water-law.com](mailto:counsel@water-law.com)  
*Attorneys for the Petitioners*

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

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

Petitioners,

v.

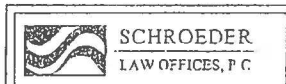
STATE ENGINEER, OF NEVADA,  
OFFICE OF THE STATE ENGINEER,  
DIVISION OF WATER RESOURCES,  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES,

Respondent.

PETITION FOR JUDICIAL REVIEW

COME NOW Petitioners KENNETH F. BENSON, DIAMOND CATTLE COMPANY,  
LLC, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LIMITED  
PARTNERSHIP (collectively referred to herein as "Petitioners"), by and through their attorneys  
of record, Schroeder Law Offices, P.C., and file and petition this Court for judicial review.

///



Petitioners petition and allege as follows:

## JURISDICTION AND PARTIES

1. Kenneth F. Benson ("Benson") is a water right holder in Diamond Valley, Nevada.

2. Diamond Cattle Company, LLC ("Diamond Cattle"), a Nevada limited liability company, is an agricultural operator in Diamond and Kobeh Valley, Nevada, whose managing members include Mark and Martin Etcheverry. Martin Etcheverry is a general partner in Michel and Margaret Ann Etcheverry Family LP.

3. Michel and Margaret Ann Etcheverry Family LP ("Etcheverry LP"), a foreign limited partnership registered in Nevada, is a landowner and water right holder in Kobeh Valley, Nevada, and in Diamond Valley, Nevada.

4. Respondent NEVADA STATE ENGINEER ("STATE ENGINEER") is an agent of the State of Nevada who, together with the Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, regulates the water use in the State.

5. A Notice of this Petition has been or will be served on the Nevada State Engineer and on all persons affected by permits issued in relation to Ruling #6127 of the State Engineer pursuant to NRS 533.450(3).

6. This Court has jurisdiction to address this petition under NRS 533.450 and NRS 233B.

7. Venue is proper under NRS 533.450. The Applications are appurtenant to lands in Eureka County.

8. Petitioners have exhausted their administrative remedies.

## REQUEST FOR CONSOLIDATION

9. Petitioners seek to have this action consolidated with Case Nos. CV 1112-165, CV 1112-164, CV 1108-155, CV 1108-156, and CV 1108-157.



10. Petitioners submitted briefing that relates to the agency errors as stated and alleged herein on January 13, 2012 within the Petitioners Kenneth F. Benson, Diamond Cattle Company LLC, and Michel and Margaret Ann Etcheverry Family LP's Opening Brief filed under consolidated Case Nos. CV 1112-165, CV 1112-164, CV 1108-155, CV 1108-156, and CV 1108-157.

## DECISIONS

11. Between May of 2005 and June of 2010, numerous applications to appropriate underground water and to change the point of diversion, place of use, and/or manner of use were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively herein the "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for a proposed molybdenum mine, known as the Mount Hope Mine Project, requiring underground water for mining and milling and dewatering purposes.

12. The Applications, a combination of applications for new appropriations of water and applications to change the point of diversion, place of use, and/or manner of use of existing water rights, requested a total combined duty under all of the Applications of 11,300 acre feet annually (afa).

13. Public administrative hearings were held on the Applications before the STATE ENGINEER on December 6, 7, 9, and 10, 2010, and May 10, 2011.

14. On July 15, 2011, the STATE ENGINEER issued Ruling-6127 granting the majority of the Applications subject to certain terms and conditions.

15. On August 11, 2011, Petitioners filed their Petition for Judicial Review challenging Ruling 6127, designated Case No. CV-1108-157, before this Court.

16. On December 1, 2011, the STATE ENGINEER issued the following permits to the Applicant: 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998,



1 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746,  
2 76989, and 76990.

3 17. On December 13, 2011, the STATE ENGINEER issued the following permits to  
4 the Applicant: 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917,  
5 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930,  
6 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, and 79942.

7 18. On December 14, 2011, the STATE ENGINEER issued Permit 78424 to the  
8 Applicant.

9 19. On December 30, 2011, Petitioners filed a Petition for Judicial Review on permit  
10 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587,  
11 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000,  
12 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, 76990,  
13 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919,  
14 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932,  
15 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, 79942, and 78424, designated  
16 Case No. CV-1112-165, before this Court.

17 20. On January 12, 2012, Petitioners filed a First Amended Petition for Judicial  
18 Review in Case No. CV-1112-165.

19 21. On January 4, 2012, the STATE ENGINEER issued Amended Permits 76008,  
20 76802, 76803, 76804, 76805, and 78424. These permits are collectively referred to herein as  
21 "Permits."

22 AGENCY ERROR(S)

23 22. The terms and conditions in the Permits issued by the STATE ENGINEER are  
24 different from and/or inconsistent with Ruling 6127 issued by the STATE ENGINEER.

25 ///

26 ///



1           23.     The STATE ENGINEER's actions in issuing Permits with a total combined duty  
2 in excess of the total combined duty of 11,300 afa approved by the STATE ENGINEER in  
3 Ruling 6127 is arbitrary and capricious.

4           24.     The STATE ENGINEER manifestly abused his discretion by failing to include in  
5 the permit terms for Permits 76008, 76802, 76803, 76804, 76805, and 78424 a requirement that  
6 any excess water produced pursuant to those permits that is not consumed within the Diamond  
7 Valley Hydrographic Basin must be returned to the Diamond Valley groundwater aquifer, a  
8 permit term which the STATE ENGINEER explicitly stated and required in Ruling 6127.

9           25.     The STATE ENGINEER's issuance of the Permits with the allowance that the  
10 Applicant can divert additional water upon a showing that the additional diversion will not  
11 exceed the consumptive use is inconsistent with Ruling 6127 that limited all changes of irrigation  
12 rights to their respective consumptive uses.

13          26.     The action of the STATE ENGINEER by issuing the Permits with terms and  
14 conditions different from and/or inconsistent with Ruling 6127 is arbitrary and capricious,  
15 contrary to and affected by error of law, without any rational basis, beyond the legitimate  
16 exercise of power and authority of the STATE ENGINEER, and has resulted in a denial of due  
17 process to Petitioners, all to the detriment and damage of Petitioners.

18                               REQUEST FOR RELIEF

19          WHEREFORE, Petitioner requests judgment as follows:

20          1.       The Court to vacate and remand the Amended Permits numbered: 76008, 76802,  
21 76803, 76804, 76805, and 78424 to the STATE ENGINEER with instructions to deny the  
22 underlying applications; and

23       ///

24       ///

25       ///

26       ///



2. Award such other and further relief as seems just and proper.

Pursuant to NRS 233B-133(4), a hearing is requested in this matter.

DATED this 1<sup>st</sup> day of February, 2012.

SCHROEDER LAW OFFICE, P.C.

Courtney O Owl  
Laura A. Schroeder, NSB #3595

Therese A. Ure, NSB #10255

Cortney D. Duke, NSB #10573

440 Marsh Ave.

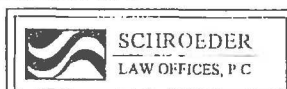
Reno, NV 89509

(775) 786-8800

FAX: (877) 600-4971

Email: [counsel@water-law.com](mailto:counsel@water-law.com)

*Attorneys for the Petitioners*



1 **AFFIRMATION**

2 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
3 **PETITION FOR JUDICIAL REVIEW** does not contain the social security number of any  
4 person.  
5

6 DATED this 1<sup>st</sup> day of February, 2012.

SCHROEDER LAW OFFICE, P.C.

7  
8 

Laura A. Schroeder, NSB #3595

Therese A. Ure, NSB #10255

Courtney D. Duke, NSB #10573

440 Marsh Ave.

Reno, NV 89509

(775) 786-8800

FAX: (877) 600-4971

Email: [counsel@water-law.com](mailto:counsel@water-law.com)

*Attorneys for Petitioners*



## **Attachment 7**

NO. \_\_\_\_\_  
FILED  
JAN 17 2012  
Eureka County Clerk  
By *Deborah Cantrell*

CASE NO.: CV1112-165  
DEPT. NO.: 2  
SCHROEDER LAW OFFICES, P.C.  
Laura A. Schroeder, Nevada State Bar #3595  
Therese A. Ure, Nevada State Bar #10255  
440 Marsh Ave.  
Reno, Nevada 89509-1515  
PHONE: (775) 786-8800, FAX: (877) 600-4971  
[counsel@water-law.com](mailto:counsel@water-law.com)  
*Attorneys for the Petitioners*

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

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

Petitioners,

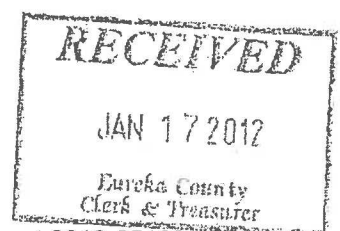
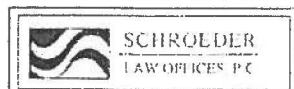
v.

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

Respondent.

**FIRST AMENDED PETITION FOR  
JUDICIAL REVIEW**

COME NOW Petitioners KENNETH F. BENSON, DIAMOND CATTLE COMPANY,  
LLC, and MICHEL AND MARGARET ANN ETCHVERRY FAMILY LIMITED  
PARTNERSHIP (collectively referred to herein as "Petitioners"), by and through their attorneys  
of record, Schroeder Law Offices, P.C., and file this first amended petition for judicial review  
including Permit 79939.  
///



1 Petitioners petition and allege as follows:

2 JURISDICTION AND PARTIES

3 1. Kenneth E. Benson ("Benson") is a water right holder in Diamond Valley,  
4 Nevada.

5 2. Diamond Cattle Company, LLC ("Diamond Cattle"), a Nevada limited liability  
6 company, is an agricultural operator in Diamond and Kobeh Valley, Nevada, whose managing  
7 members include Mark and Martin Etcheverry. Martin Etcheverry is a general partner in Michel  
8 and Margaret Ann Etcheverry Family LP.

9 3. Michel and Margaret Ann Etcheverry Family LP ("Etcheverry LP"), a foreign  
10 limited partnership registered in Nevada, is a landowner and water right holder in Kobeh Valley,  
11 Nevada.

12 4. Respondent NEVADA STATE ENGINEER ("STATE ENGINEER") is an agent  
13 of the State of Nevada who, together with the Office of the State Engineer, Division of Water  
14 Resources, Department of Conservation and Natural Resources, regulates the water use in the  
15 State.

16 5. A Notice of this Petition has been or will be served on the Nevada State Engineer  
17 and on all persons affected by permits issued in relation to Ruling #6127 of the State Engineer  
18 pursuant to NRS 533.450(3).

19 6. This Court has jurisdiction to address this petition under NRS 533.450 and NRS  
20 233B.

21 7. Venue is proper under NRS 533.450. The Applications are appurtenant to lands  
22 in Eureka County.

23 8. Petitioners have exhausted their administrative remedies

24 REQUEST FOR CONSOLIDATION

25 9. Petitioners seek to have this action consolidated with Case Nos. CV 1112-164,  
26 CV 1108-155, CV 1108-156, and CV 1108-157.



DECISIONS

10. Between May of 2005 and June of 2010, numerous applications to appropriate underground water and to change the point of diversion, place of use, and/or manner of use were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively herein the "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for a proposed molybdenum mine, known as the Mount Hope Mine Project, requiring underground water for mining and milling and dewatering purposes.

11. The Applications, a combination of applications for new appropriations of water and applications to change the point of diversion, place of use, and/or manner of use of existing water rights, requested a total combined duty under all of the Applications of 11,300 acre feet annually (afa).

12. Public administrative hearings were held on the Applications before the STATE ENGINEER on December 6, 7, 9, and 10, 2010, and May 10, 2011.

13. On July 15, 2011, the STATE ENGINEER issued Ruling 6127 granting the majority of the Applications subject to certain terms and conditions.

14. On August 11, 2011, Petitioners filed their Petition for Judicial Review challenging Ruling 6127, designated Case No. CV-1108-157, before this Court.

15. On December 1, 2011, the STATE ENGINEER issued the following permits to the Applicant: 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, and 76990.

16. On December 13, 2011, the STATE ENGINEER issued the following permits to the Applicant: 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917,

///



1 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930,  
2 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, and 79942.

3 17. On December 14, 2011, the STATE ENGINEER issued Permit 78424 to the  
4 Applicant. All of the permits issued on December 1, 2011, December 13, 2011, and December  
5 14, 2011 are collectively referred to herein as "Permits".

6 AGENCY ERROR(S)

7 18. The terms and conditions in the Permits issued by the STATE ENGINEER are  
8 different from and/or inconsistent with Ruling 6127 issued by the STATE ENGINEER.

9 19. The STATE ENGINEER's actions in issuing Permits with a total combined duty  
10 in excess of the total combined duty of 11,300 afa approved by the STATE ENGINEER in  
11 Ruling 6127 is arbitrary and capricious.

12 20. The STATE ENGINEER manifestly abused his discretion by failing to include in  
13 the permit terms for Permits 76005, 76006, 76008, 76009, 76802, 76803, 76804, 76805, and  
14 78424 a requirement that any excess water produced pursuant to those permits that is not  
15 consumed within the Diamond Valley Hydrographic Basin must be returned to the Diamond  
16 Valley groundwater aquifer, a permit term which the STATE ENGINEER explicitly stated and  
17 required in Ruling 6127.

18 21. The STATE ENGINEER's issuance of the Permits with the allowance that the  
19 Applicant can divert additional water upon a showing that the additional diversion will not  
20 exceed the consumptive use is inconsistent with Ruling 6127 that limited all changes of irrigation  
21 rights to their respective consumptive uses.

22 22. The STATE ENGINEER's issuance of the Permits with an approximately 90,000  
23 acre place of use is contrary to the substantial evidence in the record and is thus arbitrary and  
24 capricious and constitutes an abuse of discretion.

25 ///

26 ///



23. The substantial evidence in the record established that the change applications for certain water rights were forfeited; thus, the STATE ENGINEER's issuance of those Permits is contrary to the substantial evidence.

24. The action of the STATE ENGINEER by issuing the Permits with terms and conditions different from and/or inconsistent with Ruling 6127 are arbitrary and capricious, contrary to and affected by error of law, without any rational basis, beyond the legitimate exercise of power and authority of the STATE ENGINEER, and have resulted in a denial of due process to Petitioners, all to the detriment and damage of Petitioners.

#### REQUEST FOR RELIEF

WHEREFORE, Petitioner requests judgment as follows:

1. The Court remand Permits numbered: 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, 76990, 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, 79942, and 78424 to the STATE ENGINEER with instructions to deny the underlying applications; and

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1        2.        Award such other and further relief as seems just and proper.

2        Pursuant to NRS 233B.133(4), a hearing is requested in this matter.

3  
4        DATED this 12th day of January, 2012.

SCHROEDER LAW OFFICE, P.C.

5  
6        \_\_\_\_\_  
Laura A. Schroeder, NSB #3595

7        Therese A. Ure, NSB #10255

8        440 Marsh Ave.

9        Reno, NV 89509

10        (775) 786-8800

11        FAX: (877)-600-4971

12        Email: [counsel@water-law.com](mailto:counsel@water-law.com)

13        *Attorneys for the Petitioners*




1 **AFFIRMATION**

2 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
3 **FIRST AMENDED PETITION FOR JUDICIAL REVIEW** does not contain the social security  
4 number of any person.

5  
6 DATED this 12th day of January, 2012.

SCHROEDER LAW OFFICE, P.C.

7 

8 Laura A. Schroeder, NSB #3595

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11 Reno, NV 89509

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15 *Attorneys for Petitioners*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of January, 2012, I caused a copy of the foregoing:  
***FIRST AMENDED PETITION FOR JUDICIAL REVIEW*** to be served by US Mail on the  
following parties:

Karen A. Peterson  
Allision, Mackenzie, Pavlakis, Wright &  
Fagan Ltd.  
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Carson City, NV 89701

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Woodburn and Wedge  
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Ross E. de Lipkau, Esq.  
Michael R. Kealy, Esq.  
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Bryan L. Stockton, Esq.  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, NV 89701

Theodore Buetel, Esq.  
Eureka County District Attorney  
701 South Main Street  
P.O. Box 190  
Eureka, Nevada 89316

Nevada State Engineer  
901 South Stewart Street  
Carson City, NV 89701

Dated this 12<sup>th</sup> day of January, 2012.



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[counsel@water-law.com](mailto:counsel@water-law.com)  
*Attorneys for Protestant Kenneth F. Benson,  
Diamond Cattle Company LLC, and Etcheverry  
Family LP*



---

## **Attachment 8**

---

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

AUG 11 2011

Eureka County Clerk  
By Heather Cantor

1 CASE NO. CX1108-157

2 DEPT. NO.: 2

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

11 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
12  
13 IN AND FOR THE COUNTY OF EUREKA

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

21 v.

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

Respondent.

PETITION FOR JUDICIAL REVIEW

21 COMES NOW, Petitioners, KENNETH F. BENSON, DIAMOND CATTLE  
22 COMPANY, LLC, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY  
23 LIMITED PARTNERSHIP (collectively referred to herein as "Petitioners"), by and through their  
24 attorneys of record, Schroeder Law Offices, P.C., and petitions and alleges as follows:

25 ///

26 ///



## JURISDICTION AND PARTIES

1. Kenneth F. Benson ("Benson") is a water right holder in Diamond Valley, Nevada.

2. Diamond Cattle Company, LLC ("Diamond Cattle"), a Nevada limited liability company, is an agricultural operator in Diamond and Kobeh Valley, Nevada, whose managing members include Mark and Martin Etcheverry. Martin Etcheverry is a general partner in Michel and Margaret Ann Etcheverry Family LP.

3. Michel and Margaret Ann Etcheverry Family LP ("Etcheverry LP"), a foreign limited partnership registered in Nevada, is a landowner and water right holder in Kobeh Valley, Nevada.

4. Respondent NEVADA STATE ENGINEER ("State Engineer") is an agent of the State of Nevada who, together with the Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, regulates the water use in the State.

5. A Notice of this Petition has been or will be served on the Nevada State Engineer and on all persons affected by Ruling #6127 of the State Engineer pursuant to NRS 533.450(3).

6. This Court has jurisdiction to address this petition under NRS 533.450 and NRS 233B.

7. Venue is proper under NRS 533.450. The Applications are appurtenant to lands in Eureka County.

## DECISIONS

8. Between May 3, 2005 and June 15, 2010, numerous applications to appropriate underground water and to change the point of diversion, place of use and/or manner of use within the Kobeh Valley (139) and Diamond Valley (153) Hydrographic Basins, Lander County and Eureka County, Nevada, were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively referred to herein as the "Applications"). The Applications filed by Idaho



General Mines, Inc. were thereafter assigned to Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for development of a proposed molybdenum mine known as the Mount Hope Mine Project requiring underground water for mining, milling and dewatering purposes.

9. The subject Applications request a total combined duty of 11,300 acre feet annually (afa).

10. On October 13-17, 2008, an administrative hearing was held before the State Engineer that resulted in the issuance of Ruling #5966 on March 26, 2009. Ruling #5966 was appealed to this Court in Case Nos. CV 0904-122 and CV 0904-123. This Court entered its decision on April 21, 2010 vacating Ruling #5966 and remanding the matter for a new hearing.

11. Benson timely filed protests on Applications 79934, 79935, 79936, 79937, 79938, and 79939, and participated in the administrative hearing.

Applicant's Application	Based on Changes to Application	CFS Requested by Applicant	AFA Requested by Applicant	Applicant's Point of Appropriation
79934	76745	1.22	819.24	Well 206
79935	76990	0.76	322.5	Well 206
79936	75990	1.0	272.64	Well 206
79937	75991	1.0	723.97	Well 206
79938	74587	1.0	723.97	Well 206
79939	73547	1.0	723.97	Well 206
Total:		5.98	3586.29	

12. Martin Etcheverry on behalf of himself, the Michel and Margaret Ann Etcheverry Family LP, and the Diamond Cattle Company, LLC, and as a witness for Eureka County, testified at the administrative hearing on December 9, 2010, in opposition to the Applications.

13. At trial, Martin Etcheverry testified at length as to the draw down of streams, creeks and wells as a direct result of the Applicant's water availability testing.

14. Etcheverry LP, the landowner to real property with water rights of use, has entered into a long term lease agreement with Diamond Cattle to operate the farming and ranching operation. This lease includes long term rights to the United States, Department of



1 Interior, Bureau of Land Management grazing preferences in the Roberts Creek Allotment. The  
2 grazing preference is an integral and indispensable part of the farming and ranching operation.  
3 Etcheverry LP is opposed to the Applications.

4 15. Diamond Cattle, an entity whose members include Mark and Martin Etcheverry,  
5 operates the grazing permits, farming, and livestock operations of Etcheverry LP in Kobeh  
6 Valley, and is opposed to the Applications. During the administrative hearing on December 9,  
7 2010, Martin Etcheverry testified as to the Applications' affects on Diamond Cattle interests.

8 16. A public administrative hearing was held on December 6, 7, 9, and 10, 2010, with  
9 one additional day on May 10, 2011.

10 17. On July 15, 2011, the State Engineer issued Ruling #6127 granting the majority of  
11 the Applications subject to certain terms and conditions.

12 18. This petition is filed with this Court on the grounds that Petitioners, who are  
13 landowners and/or agricultural producers in Eureka County with interests in the rights of use to  
14 ground water, as well as holders of property interests in ground water rights, are aggrieved by  
15 State Engineer Ruling #6127.

#### 16 GENERAL ALLEGATIONS

17 19. The State Engineer's Ruling #6127 is arbitrary, capricious and an abuse of  
18 discretion and/or exceeds his statutory authority in one or more of the following ways:

- 19 A. Failing to consider and address substantial evidence on the impacts of  
20 granting the Applications on existing water rights, including but not  
21 limited to failing to address Applicant's diversions from Well 206,  
22 being approximately 75 feet from Petitioner Etcheverry LP and  
23 Diamond Cattle's Roberts Creek Ranch. Applicant's own witnesses  
24 testified to 'dewatering' the carbonate aquifer upon which Petitioners  
25 rely for their irrigation, stock and domestic water uses.

26 ///



- 1 B. Determining that impacts from Applicant's pumping to existing rights  
2 can be adequately and fully mitigated by the Applicant is contrary to  
3 the evidence presented by existing water right holders that such  
4 impacts could not be mitigated.
- 5 C. Failing to adequately address the statutorily required elements for an  
6 interbasin transfer of water and the substantial evidence submitted  
7 regarding such elements.
- 8 D. Determining that Applicant's groundwater model was suitable to  
9 forecast impacts on the proposed water use.
- 10 E. Relying on a mitigation plan yet to be drafted to address impacts to  
11 existing rights and potential future impacts.
- 12 F. Approving the place of use requested was contrary to the substantial  
13 evidence on the record given that the actual well locations for the  
14 Mount Hope Mine Project are not known.
- 15 G. Ruling #6127 approved Applications for certain water rights that had  
16 been forfeited.
- 17 H. The record did not support findings and determinations made by the  
18 State Engineer in Ruling #6127 that changed the perennial yields of  
19 certain basins as there is no evidence in the Record that the Applicant  
20 can capture the perennial yield of the Kobeh Valley Hydrographic  
21 Basin and thus would be taking water from the basin's storage, which  
22 is contrary to the State Engineer's precedent and determinations  
23 regarding perennial yield.
- 24 I. Failing to allow for the incorporation and consideration of the USGS  
25 study as to the ground water flow between the seven hydrographic  
26 basins that encompass the Diamond Valley Flow System.



20. The substantial rights of Petitioners have been prejudiced because Ruling #6127 of the State Engineer violates statutory provisions, is in excess of the statutory authority of the State Engineer, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and is characterized by an abuse of discretion.

21. Ruling #6127 of the State Engineer is arbitrary and capricious, contrary to and affected by error of law, without any rational basis, violated Petitioners' due process rights, is beyond the legitimate exercise of power and authority of the State Engineer and is without consideration of all the facts and circumstances and the entire record as a whole.

22. Petitioner Benson has exhausted his administrative remedies.

23. Petitioners Diamond Cattle and Etcheverry LP have exhausted their administrative remedies by participating via testimony of Martin Etcheverry in opposition to the Applicant at the administrative level, and are aggrieved parties pursuant to NRS 533.450(1).

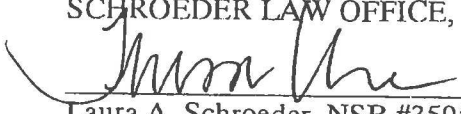
WHEREFORE, Petitioners request relief as follows:

1. Granting judicial review of the State Engineer Ruling #6127 issued on July 15, 2011;
2. Vacating and setting aside the State Engineer Ruling #6127 issued on July 15, 2011;
3. For the costs of suit herein incurred;
4. For reasonable attorney fees; and
5. For such other and further relief that this Court deems just and proper.

Pursuant to NRS 233B.133(4), a hearing is requested in this matter.

DATED this 10<sup>th</sup> day of August, 2011.

SCHROEDER LAW OFFICE, P.C.

  
\_\_\_\_\_  
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Therese A. Ure, NSB #10255

440 Marsh Ave.

Reno, NV 89509

(775) 786-8800

Email: [counsel@water-law.com](mailto:counsel@water-law.com)

*Attorneys for the Petitioners*




1 **AFFIRMATION**

2 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
3 ***PETITION FOR JUDICIAL REVIEW*** does not contain the social security number of any  
4 person.

5  
6 DATED this 10<sup>th</sup> day of August, 2011.

SCHROEDER LAW OFFICE, P.C.

7  
8 

Laura A. Schroeder, NSB #3595

Therese A. Ure, NSB #10255

440 Marsh Ave.

Reno, NV 89509

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Email: [counsel@water-law.com](mailto:counsel@water-law.com)

*Attorneys for Petitioners*



## **Attachment 9**

ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

1 Case No. LV1108-135

2 Dept. No. 2

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

AUG 08 2011

Eureka County Clerk  
*Shannah Cash*

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

9 EUREKA COUNTY, a political  
10 subdivision of the State of Nevada,

Petitioner,

11 vs.

**PETITION FOR JUDICIAL  
REVIEW**

(Exempt from Arbitration:  
Judicial Review of  
Administrative Decision)

12  
13 THE STATE OF NEVADA, EX. REL.,  
14 STATE ENGINEER, DIVISION OF  
WATER RESOURCES,

15 Respondent.

16 \_\_\_\_\_ /  
17 Petitioner, EUREKA COUNTY, a political subdivision of the State of Nevada, by  
18 and through its counsel ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD. and  
19 THEODORE BEUTEL, EUREKA COUNTY DISTRICT ATTORNEY, petitions and alleges as  
follows:

20 1. Petitioner, EUREKA COUNTY, is a political subdivision of the State of  
21 Nevada.

22 2. Respondent, THE STATE OF NEVADA, EX. REL., STATE ENGINEER,  
23 DIVISION OF WATER RESOURCES ("STATE ENGINEER"), is empowered to act pursuant to  
24 the provisions of Chapters 533 and 534 of the Nevada Revised Statutes on applications to  
25 appropriate water, protests filed against applications to appropriate water and all matters related  
26 thereto.

27 3. This Petition is brought pursuant to the procedures authorized and provided  
28 for in NRS 533.450.

ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

1           4.     A Notice of this Petition has been or will be served on the STATE  
2 ENGINEER and the person(s) who may have been affected by Ruling #6127 of the STATE  
3 ENGINEER as required by NRS 533.450(3).

4           5.     Between May of 2005 and June of 2010 numerous applications to appropriate  
5 underground water and to change the point of diversion, place of use and/or manner of use were filed  
6 by IDAHO GENERAL MINES, INC. and KOBEH VALLEY RANCH LLC (collectively herein the  
7 "Applications"). The Applications filed by IDAHO GENERAL MINES, INC. were thereafter  
8 assigned to KOBEH VALLEY RANCH LLC (the "Applicant"). The Applications were filed for a  
9 proposed molybdenum mine known as the Mount Hope Mine Project requiring underground water  
10 for mining and milling and dewatering purposes.

11           6.     The Applications, a combination of applications for new appropriations of  
12 water and applications to change the point of diversion, place of use and/or manner of use of existing  
13 water rights, requested a total combined duty under all of the Applications of 11,300 acre feet  
14 annually (afa).

15           7.     EUREKA COUNTY filed protests to all the Applications except one.

16           8.     On October 13-17, 2008, the STATE ENGINEER held an administrative  
17 hearing on the Applications filed by the Applicant between May of 2005 and April of 2008 to  
18 support the Mount Hope Mine Project. The STATE ENGINEER issued Ruling #5966 on March 26,  
19 2009.

20           9.     Ruling #5966 was appealed to this Court in Case Nos. CV 0904-122 and CV  
21 0904-123. This Court vacated Ruling #5966 by its Findings of Fact, Conclusions of Law, and Order  
22 Granting Petition for Judicial Review, Vacating Ruling #5966, and Remanding Matter for New  
23 Hearing entered April 21, 2010.

24           10.    Public administrative hearings were held on the Applications before the  
25 STATE ENGINEER on December 6, 7, 9 and 10, 2010 and May 10, 2011. The administrative  
26 record from the 2008 administrative hearing was incorporated into the 2010 administrative record.

27           11.    On July 15, 2011, the STATE ENGINEER issued Ruling #6127 granting the  
28 majority of the Applications subject to certain terms and conditions.

1           12. The STATE ENGINEER arbitrarily and capriciously failed to consider and  
2 address substantial evidence regarding the impacts of granting the Applications on existing rights  
3 in violation of his statutory duty. The STATE ENGINEER's determination that impacts from the  
4 Applicant's pumping to existing rights can be adequately and fully mitigated by the Applicant and  
5 the STATE ENGINEER could grant the applications violated NRS 533.370(5). The STATE  
6 ENGINEER's finding that impacts could be mitigated was contrary to the evidence of existing  
7 right holders that such impacts could not be mitigated.

8           13. The STATE ENGINEER failed to adequately address the statutorily required  
9 elements for an interbasin transfer of water or the substantial evidence submitted regarding such  
10 elements. Thus, the STATE ENGINEER's determination is arbitrary, capricious and an abuse of  
11 discretion.

12           14. The STATE ENGINEER's determination that Applicant's groundwater model  
13 was suitable to determine impacts was arbitrary, capricious and an abuse of discretion.

14           15. The STATE ENGINEER's determination to rely upon a mitigation plan to  
15 be drafted in the future to address impacts to existing rights and potential future impacts is  
16 arbitrary and capricious and in excess of the STATE ENGINEER's statutory authority.

17           16. The STATE ENGINEER's approval of the place of use requested in the  
18 Applications was contrary to the substantial evidence on the record and is thus arbitrary and  
19 capricious and constitutes an abuse of discretion.

20           17. The Applicant's actual well locations for the Mount Hope Mine Project are  
21 not known and the STATE ENGINEER's determination to grant the Applications was arbitrary,  
22 capricious and an abuse of discretion.

23           18. Contrary to the substantial evidence on the record, Ruling #6127 approved  
24 the change applications for certain water rights that had been forfeited.

25           19. There was no evidence of record to support certain findings and  
26 determinations made by the STATE ENGINEER in Ruling #6127 changing the perennial yields of  
27 certain basins. The STATE ENGINEER's Ruling #6127 is arbitrary, capricious and constitutes an  
28 abuse of discretion.

ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
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20. There is no evidence in the record that the Applicant can capture the perennial yield of the Kobeh Valley Hydrographic Basin and thus would be taking water from the basin's storage, which is contrary to the STATE ENGINEER's precedent and determinations regarding perennial yield. The STATE ENGINEER's Ruling #6127 is arbitrary, capricious and constitutes an abuse of discretion.

21. The substantial rights of EUREKA COUNTY have been prejudiced because Ruling #6127 of the STATE ENGINEER violates statutory provisions, is in excess of the statutory authority of the STATE ENGINEER, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and is characterized by an abuse of discretion.

22. Ruling #6127 of the STATE ENGINEER is arbitrary and capricious, contrary to and affected by error of law, without any rational basis, violated EUREKA COUNTY's due process rights, and is beyond the legitimate exercise of power and authority of the STATE ENGINEER, all to the detriment and damage of EUREKA COUNTY.

23. Ruling #6127 is not supported by substantial evidence in the record before the STATE ENGINEER and is without consideration of all the facts and circumstances and the entire record as a whole.

24. EUREKA COUNTY has exhausted its administrative remedies.

WHEREFORE, Petitioner prays for judgment as follows:

1. That the Court vacate Ruling #6127 and deny the Applications; and
2. That the Court award such other and further relief as seems just and proper in the premises.

DATED this 8 day of August, 2011.

ALLISON, MacKENZIE, PAVLAKIS,  
WRIGHT & FAGAN, LTD.  
KAREN A. PETERSON, ESQ.  
Nevada State Bar No. 0366  
JENNIFER MAHE, ESQ.  
Nevada State Bar No. 9620  
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Carson City, NV 89703  
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-and-

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**EUREKA COUNTY DISTRICT ATTORNEY**

701 South Main Street

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By: 

THEODORE BEUTEL, ESQ.

Nevada State Bar No. 5222

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EUREKA COUNTY

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SEVENTH JUDICIAL DISTRICT COURT  
COUNTY OF EUREKA, STATE OF NEVADA

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, **Petition for Judicial Review** filed in case number: CV 1108-155

- ☒ Document does not contain the social security number of any person  
-OR-  
☐ Document contains the social security number of a person as required by:  
☐ A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific state or federal law)

-or-

- ☐ For the administration of a public program  
-or-  
☐ For an application for a federal or state grant  
-or-  
☐ Confidential Family Court Information Sheet  
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: August 8, 2011.

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Nevada State Bar No. 5222

Attorneys for Petitioner,  
EUREKA COUNTY

---

Petition for Judicial Review  
Case No. 1112-164  
Eureka County v. The State of Nevada, Ex Rel, et al.

Petition for Judicial Review  
Case No. 1112-164  
Eureka County v. The State of Nevada, Ex Rel, et al.

---

DEC 29 2011

*Jackie Berg*

Case No. CV 1112-164

Dept. No. \_\_\_\_\_

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

EUREKA COUNTY,  
a political subdivision of the State of Nevada,

Petitioner,

vs.

THE STATE OF NEVADA, EX. REL.,  
STATE ENGINEER, DIVISION OF  
WATER RESOURCES,

Respondent.

**PETITION FOR JUDICIAL  
REVIEW**

(Exempt from Arbitration:  
Judicial Review of  
Administrative Decision)

Petitioner, EUREKA COUNTY, a political subdivision of the State of Nevada, by  
and through its counsel ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD. and  
THEODORE BEUTEL, EUREKA COUNTY DISTRICT ATTORNEY, petitions and alleges as  
follows:

1. Petitioner, EUREKA COUNTY, is a political subdivision of the State of  
Nevada.

2. Respondent, THE STATE OF NEVADA, EX. REL., STATE ENGINEER,  
DIVISION OF WATER RESOURCES ("STATE ENGINEER"), is empowered to act pursuant to  
the provisions of Chapters 533 and 534 of the Nevada Revised Statutes on applications to  
appropriate water, protests filed against applications to appropriate water and all matters related  
thereto.

3. This Petition is brought pursuant to the procedures authorized and provided  
for in NRS 533.450.

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1           4.     A Notice of this Petition has been served on the STATE ENGINEER and all  
2 persons affected as required by NRS 533.450(3).

3           5.     Between May of 2005 and June of 2010 numerous applications to appropriate  
4 underground water and to change the point of diversion, place of use and/or manner of use were filed  
5 by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively herein the "Applications").  
6 The Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobeh Valley  
7 Ranch LLC (the "Applicant"). The Applications were filed for a proposed molybdenum mine  
8 known as the Mount Hope Mine Project requiring underground water for mining and milling and  
9 dewatering purposes.

10          6.     The Applications, a combination of applications for new appropriations of  
11 water and applications to change the point of diversion, place of use and/or manner of use of existing  
12 water rights, requested a total combined duty under all of the Applications of 11,300 acre feet  
13 annually (afa).

14          7.     EUREKA COUNTY filed protests to all the Applications except one.

15          8.     Public administrative hearings were held on the Applications before the  
16 STATE ENGINEER on December 6, 7, 9 and 10, 2010 and May 10, 2011.

17          9.     On July 15, 2011, the STATE ENGINEER issued Ruling 6127 granting the  
18 majority of the Applications subject to certain terms and conditions.

19          10.    On August 8, 2011, EUREKA COUNTY filed its Petition for Judicial Review  
20 challenging Ruling 6127, designated Case No. CV-1108-155, before this Court.

21          11.    On December 1, 2011, the STATE ENGINEER issued the following permits  
22 to the Applicant: 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551,  
23 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998,  
24 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746,  
25 76989, and 76990.

26          12.    On December 13, 2011, the STATE ENGINEER issued the following permits  
27 to the Applicant: 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917,  
28

1 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930,  
2 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79940, 79941 and 79942.

3 13. On December 14, 2011, the STATE ENGINEER issued Permit 78424 to the  
4 Applicant. All of the permits issued on December 1, 2011, December 13, 2011 and December 14,  
5 2011 are collectively referred to herein as "Permits".

6 14. The terms and conditions in the Permits issued by the STATE ENGINEER are  
7 different from and/or inconsistent with Ruling 6127 issued by the STATE ENGINEER.

8 15. The STATE ENGINEER's actions in issuing Permits with a total combined  
9 duty in excess of the total combined duty of 11,300 afa approved by the STATE ENGINEER in  
10 Ruling 6127 is arbitrary and capricious.

11 16. The STATE ENGINEER manifestly abused his discretion by failing to  
12 include in the permit terms for Permits 76005, 76006, 76008, 76009, 76802, 76803, 76804, 76805  
13 and 78424 a requirement that any excess water produced pursuant to those permits that is not  
14 consumed within the Diamond Valley Hydrographic Basin must be returned to the Diamond Valley  
15 groundwater aquifer, a permit term which the STATE ENGINEER explicitly stated and required in  
16 Ruling 6127.

17 17. The STATE ENGINEER's issuance of the Permits with the allowance that the  
18 Applicant can divert additional water upon a showing that the additional diversion will not exceed  
19 the consumptive use is inconsistent with Ruling 6127 that limited all changes of irrigation rights to  
20 their respective consumptive uses.

21 18. The STATE ENGINEER's issuance of the Permits with an approximately  
22 90,000 acre place of use, is contrary to the substantial evidence in the record and is thus arbitrary and  
23 capricious and constitutes an abuse of discretion.

24 19. The substantial evidence in the record established that the change applications  
25 for certain water rights had been forfeited; thus, the STATE ENGINEER's issuance of those Permits  
26 is contrary to the substantial evidence.

27 20. The action of the STATE ENGINEER by issuing the Permits with terms and  
28 conditions different from and/or inconsistent with Ruling 6127 are arbitrary and capricious, contrary

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1 to and affected by error of law, without any rational basis, beyond the legitimate exercise of power  
2 and authority of the STATE ENGINEER, and have resulted in a denial of due process to EUREKA  
3 COUNTY, all to the detriment and damage of EUREKA COUNTY.

4 21. EUREKA COUNTY has exhausted its administrative remedies.

5 22. EUREKA COUNTY seeks to have this action consolidated with Case Nos.CV  
6 1108-155; CV 1108-156 and CV 1108-157.

7 WHEREFORE, Petitioner prays for judgment as follows:

- 8 1. That the Court vacate the above-stated Permits; and  
9 2. That the Court award such other and further relief as seems just and proper in  
10 the premises.

11 DATED this 29<sup>th</sup> day of December, 2011.

12 KAREN A. PETERSON, ESQ.  
13 Nevada State Bar No. 0366  
14 JENNIFER MAHE, ESQ.  
15 Nevada State Bar No. 9620  
16 ALLISON, MacKENZIE, PAVLAKIS,  
17 WRIGHT & FAGAN, LTD.  
18 402 North Division Street  
19 P.O. Box 646  
20 Carson City, NV 89702

21 -and-

22 EUREKA COUNTY DISTRICT ATTORNEY  
23 701 South Main Street  
24 P.O. Box 190  
25 Eureka, NV 89316

26 By:   
27 THEODORE BEUTEL, ESQ.  
28 Nevada State Bar No. 5222

Attorneys for Petitioner,  
EUREKA COUNTY

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SEVENTH JUDICIAL DISTRICT COURT  
COUNTY OF EUREKA, STATE OF NEVADA

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, **Petition for Judicial Review** filed in case number: CV1112-164

- ☒ Document does not contain the social security number of any person  
-OR-  
☐ Document contains the social security number of a person as required by:  
☐ A specific state or federal law, to wit:  
\_\_\_\_\_  
(State specific state or federal law)  
-or-  
☐ For the administration of a public program  
-or-  
☐ For an application for a federal or state grant  
-or-  
☐ Confidential Family Court Information Sheet  
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: December 29, 2011.

EUREKA COUNTY DISTRICT ATTORNEY  
701 South Main Street  
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By:   
THEODORE BEUTEL, ESQ.  
Nevada State Bar No. 5222

Attorneys for Petitioner,  
EUREKA COUNTY

**Supplemental Petition for Judicial Review  
Case No. 1112-164  
Eureka County v. The State of Nevada, Ex Rel, et al.**

**Petition for Judicial Review  
Case No. 1112-164  
Eureka County v. The State of Nevada, Ex Rel, et al.**

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

JAN 31 2012

Eureka County Clerk  
By: *Jackie Borg*

1 Case No. CV1112-164

2 Dept. No. 2

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

9 EUREKA COUNTY,  
10 a political subdivision of the State of Nevada,

11 Petitioner,

12 vs.

13 THE STATE OF NEVADA, EX. REL.,  
14 STATE ENGINEER, DIVISION OF  
15 WATER RESOURCES, and KOBEH  
16 VALLEY RANCH, LLC, a Nevada  
17 limited liability company,

18 Respondents.  
19 \_\_\_\_\_ /

**SUPPLEMENTAL  
PETITION FOR JUDICIAL  
REVIEW**

(Exempt from Arbitration:  
Judicial Review of  
Administrative Decision)

20 Petitioner, EUREKA COUNTY, a political subdivision of the State of Nevada, by  
21 and through its counsel ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD. and  
22 THEODORE BEUTEL, EUREKA COUNTY DISTRICT ATTORNEY, submits its Supplemental  
23 Petition for Judicial Review seeking judicial review of Amended Permits 76008, 76802, 76803,  
24 76804, 76805 and 78424 issued by Respondent, STATE ENGINEER, on January 4, 2012.

25 1. This Petition is brought pursuant to the procedures authorized and provided  
26 for in NRS 533.450.

27 2. A Notice of this Supplemental Petition has been served on the STATE  
28 ENGINEER and all persons affected as required by NRS 533.450(3).

3. EUREKA COUNTY adopts and incorporates by reference the allegations of  
its Petition for Judicial Review filed December 29, 2011 in Case No. CV1112-164 in this  
Supplemental Petition for Judicial Review.

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1                   4.     The substantial rights of EUREKA COUNTY have been prejudiced by the  
2 STATE ENGINEER's action granting amended permits with terms and conditions different from  
3 and/or inconsistent with Ruling 6127.

4                   5.     EUREKA COUNTY has already submitted its arguments and record on  
5 appeal in support of this Supplemental Petition for Judicial Review in its Opening Brief filed  
6 January 13, 2012 in consolidated Case Nos. CV1108-155, CV1108-156, CV1108-157, CV1112-164  
7 and CV1112-165.

8                   WHEREFORE, Petitioner prays for judgment on its Supplemental Petition for  
9 Judicial Review as follows:

- 10                   1.     That the Court vacate the above-stated Amended Permits; and  
11                   2.     That the Court award such other and further relief as seems just and proper in  
12 the premises.

13                   DATED this 31<sup>st</sup> of January, 2012.

14                   KAREN A. PETERSON, ESQ.  
15 Nevada State Bar No. 0366  
16 JENNIFER MAHE, ESQ.  
17 Nevada State Bar No. 9620  
18 ALLISON, MacKENZIE, PAVLAKIS,  
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23                   -and-

24                   EUREKA COUNTY DISTRICT ATTORNEY  
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27 Eureka, NV 89316

28                   By:   
THEODORE BEUTEL, ESQ.  
Nevada State Bar No. 5222

Attorneys for Petitioner,  
EUREKA COUNTY

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**SEVENTH JUDICIAL DISTRICT COURT  
COUNTY OF EUREKA, STATE OF NEVADA**

**AFFIRMATION  
Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document, **Supplemental Petition for Judicial Review** filed in case number: CV1112-164

- ☒ Document does not contain the social security number of any person  
-OR-  
☐ Document contains the social security number of a person as required by:  
☐ A specific state or federal law, to wit:  
\_\_\_\_\_  
(State specific state or federal law)  
-or-  
☐ For the administration of a public program  
-or-  
☐ For an application for a federal or state grant  
-or-  
☐ Confidential Family Court Information Sheet  
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: January 31, 2012.

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By:   
\_\_\_\_\_  
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## **Attachment 10**

**131 Nev., Advance Opinion 84**  
**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,

vs.

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,

vs.

STATE ENGINEER OF NEVADA,  
OFFICE OF THE STATE ENGINEER,  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES; AND  
KOBEH VALLEY RANCH, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,  
Respondents.

No. 61324

**FILED**

OCT 29 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

No. 63258

Consolidated appeals challenging district court orders denying judicial review of the State Water Engineer's decisions affecting water rights. Seventh Judicial District Court, Eureka County; Dan L. Papez, Judge.

*Reversed and remanded.*

Allison, MacKenzie, Ltd., and Karen A. Peterson, Jennifer Mahe, and Dawn Ellerbrock, Carson City; Theodore Beutel, District Attorney, Eureka County,  
for Appellant Eureka County.

Schroeder Law Offices, P.C., and Laura A. Schroeder and Therese A. Ure, Reno,  
for Appellants Kenneth F. Benson; Diamond Cattle Company, LLC; and Michel and Margaret Ann Etcheverry Family, LP.

Adam Paul Laxalt, Attorney General, and Micheline N. Fairbank, Senior Deputy Attorney General, Carson City,  
for Respondents the State of Nevada Division of Water Resources and the State Engineer.

Parsons Behle & Latimer and Ross E. de Lipkau and John R. Zimmerman, Reno; Parsons Behle & Latimer and Francis M. Wikstrom, Salt Lake City, Utah,  
for Respondent Kobeh Valley Ranch, LLC.

Dyer, Lawrence, Flaherty, Donaldson & Prunty and Francis C. Flaherty, Carson City,  
for Amicus Curiae NV Energy, Inc.

Lewis Roca Rothgerber, LLP, and Daniel F. Polsenberg, Las Vegas; Taggart & Taggart, Ltd., and Paul G. Taggart, Carson City; Gregory J. Walch and Dana R. Walsh, Las Vegas,  
for Amici Curiae Municipal Water Purveyors.

BEFORE THE COURT EN BANC.

*OPINION<sup>1</sup>*

By the Court, PICKERING, J.:

These consolidated appeals challenge the district court's orders denying judicial review of the State Water Engineer's decisions affecting water rights. Under NRS 533.370(2), the State Engineer "shall reject" an application for a proposed use of water or change of existing water rights where that "proposed use or change conflicts with existing rights." The parties ask this court to determine whether this section allows for the State Engineer to take into account the applicant's ability to mitigate the drying up of existing rights holders' water sources when determining if a proposed use or change will conflict with existing rights. However, even assuming that under NRS 533.370(2) the State Engineer has authority to grant an application that conflicts with existing rights based upon a determination that the applicant will be able to mitigate, the State Engineer's decision to approve the applications and issue the permits at issue here is not supported by sufficient evidence that successful mitigation efforts may be undertaken so as to dispel the threat to the existing rights holders. We thus reverse the district court's decision denying judicial review of the State Engineer's decisions and remand.

---

<sup>1</sup>We originally reversed and remanded in an unpublished order. Appellants and other interested persons not party to these appeals moved to publish the order as an opinion. We grant the motions and publish this opinion in place of our earlier order. See NRAP 36(f).

I.

At the heart of this appeal is the Mount Hope Mine, a large proposed molybdenum mine that General Moly, Inc. seeks to establish in Eureka County. The mine's contemplated life is 44 years, and will require an estimated total of 11,300 acre feet of water per year (afa). To provide the water for the mine, General Moly seeks to pump groundwater by well from the Kobeh Valley and Diamond Valley groundwater basins, basins that already source many existing water rights, which will cause a drawdown of the water table throughout the two valleys. According to a water resources monitoring plan created by Eureka Moly, LLC, a subsidiary of General Moly, the vast majority of this water for the Mount Hope Mine "will be consumptively used in processing activities of the [mining] Project (*i.e.*[,] no water will be returned to the aquifer)."

General Moly created respondent Kobeh Valley Ranch, LLC (KVR) to hold and control the water rights for the project. Water rights already appropriated by a predecessor entity associated with the mining project were transferred to KVR, as were existing applications to appropriate water that the predecessor had filed in 2005. Between 2006 and 2010, KVR also filed numerous applications to change the point of diversion, the place of use, and the manner of use of other of its existing water rights. Appellant Eureka County protested KVR's applications on numerous grounds, including that KVR's groundwater appropriations would conflict with existing rights under NRS 533.370(2). A number of holders of senior water rights sourced in Kobeh Valley and Diamond Valley also protested on those, and other, grounds. The State Engineer originally held a hearing on the applications, then pending, in 2008, after which he approved some of KVR's applications over these objections, but

upon review the district court vacated the ruling and remanded the matter back to the State Engineer for a new hearing.

The State Engineer held another hearing in 2010, in which he accepted the evidence presented at the first hearing and allowed additional evidence to be presented regarding specific water usage at the proposed mining project. The State Engineer ultimately granted all of KVR's applications in his Ruling Number 6127.

Pertinent to this appeal, the State Engineer recognized that certain springs located on the Kobeh Valley floor that are in hydrologic connection with the underlying water table and that source existing, senior water rights would be "impacted" by KVR's pumping. However, the State Engineer found that KVR could fully mitigate any impact, and to that end required KVR to prepare, with the assistance of Eureka County, a monitoring, management, and mitigation plan (3M Plan) for approval by the State Engineer before KVR diverted any water. The State Engineer then issued KVR the various use and change permits requested.

Eureka County, as well as appellants Kenneth F. Benson, Diamond Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family, LP, (collectively referred to as Benson-Etcheverry), all of whom hold existing, senior rights in the valleys, petitioned the district court for judicial review of Ruling 6127. The district court denied the petition, finding that substantial evidence supported the State Engineer's decision that KVR would be able to mitigate any adverse impacts to existing water rights. The district court further held that NRS 533.370(2) "does not prevent the State Engineer from granting applications that may impact existing rights if the existing right can be protected through mitigation, thus avoiding a conflict with existing rights."

While Ruling 6127 was before the district court, KVR developed a 3M Plan in coordination with Eureka County. Though the State Engineer approved the 3M Plan, he retained ultimate authority over it, stating that the 3M Plan was approved with the "understanding that components of the Plan are subject to modification based on need, prior monitoring results, or changes in the approved water rights." Benson-Etcheverry petitioned the district court for judicial review of this decision, but the district court denied that petition as well.

Eureka County and Benson-Etcheverry appeal the district court's order denying judicial review of Ruling 6127. Benson-Etcheverry also appeal the district court's subsequent order denying judicial review of the State Engineer's approval of the 3M Plan.

## II.

### A.

The State Engineer, who is charged with administering water rights in this state, *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997), is required to approve applications to appropriate new water rights or to change the place, manner, or use of existing water rights if the applicant meets certain statutory requirements. NRS 533.370(1). However:

Except as otherwise provided in subsection 10 [which excepts applications for environmental or temporary permits], 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.*

NRS 533.370(2) (emphases added).

The State Engineer and KVR submit that the State Engineer may conditionally grant proposed use or change applications on the basis of future successful mitigation, thereby ensuring that the new or changed appropriation does not conflict with existing rights, in accordance with NRS 533.370(2). This court has never addressed whether the statute may be read in this manner, and we need not do so at this time. Even assuming that the State Engineer may grant a proposed use or change application on the basis of the appropriator's ability to successfully mitigate and bring the existing water rights back to their full beneficial use, substantial evidence does not support the State Engineer's decision that this is the case here. *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) ("With questions of fact, the reviewing court must limit itself to a determination of whether substantial evidence in the record supports the State Engineer's decision.").

B.

The State Engineer in his Ruling 6127 recognized that there would be "extensive" drawdown of the water table in Kobeh Valley near KVR's main well field area due to KVR's groundwater pumping, which could "impact" existing "rights on springs and streams in hydrologic connection with the water table . . . includ[ing] valley floor springs." He also recognized that:

Water rights that could potentially be impacted are those rights on the valley floor where there is predicted drawdown of the water table due to

mine pumping. The Applicant recognizes that certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping. These springs produce less than one gallon per minute and provide water for livestock purposes.

(footnotes omitted).<sup>2</sup> But the evidence to which the State Engineer cited demonstrates that more than just an “impact” to these low-flow springs would occur. For instance, the State Engineer cited to KVR’s hydrogeology expert Terry Katzer’s testimony at the 2010 hearing that KVR’s pumping would dry up certain springs and stock watering wells:

Q: Okay. Will the pumping over time cause impacts to springs in direct stock watering wells in the floor of Kobeh Valley?

A: I believe it will. And I can’t name the springs because I am not that familiar with them. Mud Springs, for instance, I know where that is. I’ve been there. It will probably dry that up with time. And other springs that are in close proximity to the well field.

Q: Stock watering wells?

A: Stock watering wells, yes, probably.

Flow modeling reports by KVR’s hydrogeology and groundwater modeling expert, Dwight Smith, to which the State Engineer also cited, confirmed this assessment:

Springs located in lower altitudes in the Roberts Mountains . . . are more likely to be impacted due

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<sup>2</sup>Eureka County challenges the “less than a gallon per minute” finding, but KVR’s 2010 flow modeling report indicates that these springs produced less than a gallon per minute. And, while the inventory KVR prepared in 2011 shows an estimated less than five gallon flow for Mud Spring, this is not inconsistent with a less than one gallon flow finding.

to closer proximity to the KVCWF[ Koveh Valley Central Well Field], resulting in larger predicted drawdown at these locations. Discharge at Mud Spring (Site 721) and Lone Mountain Spring (Site 742), located near the southeast edge of the KVCWF near proposed well 226, are predicted to be impacted and will likely cease to flow based on predicted drawdowns of 40 to 50 feet. Both of these springs discharge less than approximately one gallon per minute.

Smith also testified that Mud Springs and another spring called Lone Mountain Springs would cease to flow fairly soon after KVR begins pumping.

The federal Bureau of Land Management (BLM) claims unadjudicated reserved rights sourced from Lone Mountain Springs. And respondent Etcheverry Family, LP, holds permitted existing rights in Mud Springs, rights consisting of 10.86 afa to use for stock watering purposes.

Therefore, contrary to the State Engineer's, KVR's, and amici's assertions, KVR's pumping would not merely impact existing water rights; the very evidence upon which the State Engineer relied demonstrates that KVR's appropriation would cause the complete depletion of the source of existing water rights. The Legislature did not define exactly what it meant by the phrase "conflicts with" as used in NRS 533.370(2), but if an appropriation that would completely deplete the source of existing water rights does not "conflict with" those existing rights, then it is unclear what appropriation ever could. Furthermore, dictionary definitions from around the time a statute is enacted can aid this court in deciphering that statute's meaning, *Douglas v. State*, 130 Nev., Adv. Op. 31, 327 P.3d 492, 494 (2014), and contemporaneous reference material with the Legislature's adoption of the "conflicts with" aspect of NRS 533.370(2), defines "conflict," in verb form, as "[t]o be in opposition; be contrary or at

variance." See 2 *The Century Dictionary and Cyclopedia, with a New Atlas of the World*, at 1186 (rev. enl. ed. 1911); 1913 Nev. Stat., ch. 140, § 63. To the extent that KVR's proposed appropriations would deplete the water available to satisfy existing rights at issue, they are undeniably "in opposition" thereto, and thus "conflict with" the existing rights under NRS 533.370(2).<sup>3</sup>

C.

Considered separate and apart from any potential mitigation techniques, the appropriations in question are in conflict with existing water rights in the valleys. But the State Engineer found KVR could implement mitigation techniques that would ameliorate the depletion of Mud Springs: "The State Engineer finds that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur." Furthermore, because "the only way to fully ensure that existing water rights are protected is by closely monitoring hydrologic conditions while groundwater pumping occurs," the State Engineer found that "a monitoring, management and mitigation plan prepared with input from Eureka County must be approved by the State Engineer prior to pumping groundwater for the project." The State Engineer thus concluded that: "Based upon substantial evidence and testimony, and the monitoring, management and mitigation plan requirement, the State Engineer

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<sup>3</sup>The State Engineer's ruling states that though the BLM originally protested KVR's appropriations, it withdrew its protests "after reaching a stipulation on monitoring, management and mitigation" with KVR. It seems the State Engineer assumed this was sufficient to dispense with the conflict under NRS 533.370(2), but this is a less than clear conclusion. In any event, Etcheverry Family, LP, has not withdrawn its protest of KVR's applications.

concludes that the approval of the applications will not conflict with existing water rights . . . .”

Nowhere in the ruling, however, does the State Engineer articulate what mitigation will encompass, even in the most general sense. And evidence of what that mitigation would entail and whether it would indeed fully restore the senior water rights at issue is lacking: there was no mitigation plan in the record before the district court or in existence when KVR’s applications were granted. Indeed, KVR’s representative Patrick Rogers acknowledged that he didn’t “know what we [General Moly] would propose in a mitigation plan. A mitigation plan hasn’t been developed yet. It would be speculative to say what we would or would not propose.”

The State Engineer and KVR point to KVR’s experts’ testimony as evidence that mitigation could occur and would be successful. But Katzer, an hydrology expert, testified only that there were “a variety of [mitigation] techniques. You could increase the well if it’s being fed by a well or you could run a pipeline to it from part of the distribution system.” KVR’s other expert, Smith, similarly testified that if predicted water table drawdown were to occur due to KVR’s pumping, “certainly there can be mitigation measures taken, many of which could include shifting[] pumping around the well field as an easy example.” While KVR’s experts testified as to the existence of a few possible mitigation techniques, they did not specify what techniques would work, much less techniques that could be implemented to mitigate the conflict with the existing rights in this particular case. And concerns over precisely how KVR, or its parent company Eureka Moly, would mitigate these conflicts are not without cause: Martin Etcheverry testified that after KVR did some experimental

pumping, one of his springs, Nichols Springs, was noticeably lower than before the pumping and that it had not yet returned to its pre-pumping levels. And according to Eureka County's natural resource manager, the Nichols Springs lowering was brought to Eureka Moly's attention multiple times, including at a meeting at the BLM's Battle Mountain office, but that neither KVR nor Eureka Moly had done anything to address the lowering of that spring.

The State Engineer and KVR alternatively assert the existing rights holders conceded that mitigation could be accomplished. But the existing rights holders, including Martin Etcheverry, merely recognized in their 2010 hearing testimony that they would be satisfied if KVR could completely and successfully mitigate the interference with their rights.

The State Engineer implies on appeal that KVR's mitigation could encompass providing substitute water to the senior rights holders by arguing that said holders are entitled only to the beneficial use of the amount of their water rights, and have no right to the historical source of their water rights. *See Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) (“[E]ven those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use.”). But to the extent KVR's mitigation would involve substitute water sources—which is not reflected in the State Engineer's decision or the evidence that was presented to him—there was no evidence before the State Engineer that KVR applied for or committed certain of its already obtained water rights to mitigation or where the substituted water would otherwise come from. And, using the State Engineer's numbers regarding the amount of water in the basin, there may not be any water left to use for mitigation after KVR's appropriation.

The State Engineer found Kobeh Valley had 15,000 afa total. KVR's appropriation is 11,300 afa, and the other committed rights had 1,100 afa, which left 2,600 afa for future appropriation. However, there is 5,530 afa in nonadjudicated claims to vested or reserved rights on file in the State Engineer's office.

This is setting aside the further, specious assumption that water from a different source would be a sufficient replacement. Take, for example, the testimony given by an existing rights holder before the State Engineer that he had seen problems before with piping in water for animals because the pipes can freeze and interfere with the flow in the extreme winter cold. Given these, seemingly supported, concerns over such potential problems, it is therefore unclear that substitution water, if available, would be sufficient. *See, e.g., Weibert v. Rothe Bros., Inc.*, 618 P.2d 1367, 1373 (Colo. 1980) ("In order to determine the adequacy of the [augmentation] plan to accomplish its intended purpose, it is necessary to consider the adequacy of the replacement water rights."); *see also Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 135 P.2d 108, 114 (Utah 1943) (examining whether the exchange of water deteriorates water quality or quantity to such a degree as to "materially impair[ ] the use").

Added to this, a surface water rights holder may be found to have abandoned its right if it no longer delivers the water or maintains the source of diversion. NRS 533.060(4)(a)-(d). Requiring that existing rights holders use water other than from the source that they currently have rights in might mean the existing rights holder would need to obtain a new permit to appropriate that new water. *See* NRS 533.060(5) ("Any such right to appropriate any of the water must be initiated by applying to the State Engineer for a permit to appropriate the water as provided in

this chapter.”). KVR did not address before the State Engineer this potential obstacle to providing water from an alternate source to mitigate, and neither did the State Engineer’s ruling.

Finally, KVR asserts that the State Engineer’s determination that “it is readily feasible to avoid conflicts when mitigating impacts to water sources that produce relatively minor amounts of water” merely reflects the State Engineer’s “experience and common sense.” But this is precisely the problem with the State Engineer’s ruling: though the State Engineer certainly may use his experience to inform his decision making, his decisions must be supported by substantial evidence in the record before him, which is not the case here. *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949.

D.

Essentially, and with all other arguments aside, the State Engineer and KVR’s position is that the State Engineer may leave for a later day, namely the day the 3M Plan is put before him, the determination of exactly what KVR’s mitigation would entail. But the State Engineer’s decision to grant an application, which requires a determination that the proposed use or change would not conflict with existing rights, NRS 533.370(2), must be made upon presently known substantial evidence, rather than information to be determined in the future, for important reasons.

First, those who protest an application to appropriate or change existing water rights must have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which the State Engineer’s decision may be based. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979); *see also* NRS 533.365(5) (“Each applicant and each protestant shall . . . provide to the State Engineer and to each

protestant and each applicant information required by the State Engineer relating to the application or protest.”). *Cf. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) (“[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.”). This necessarily means that the opportunity to challenge the evidence must be given *before* the State Engineer grants proposed use or change applications. Those who protest an application’s grant cannot be forced to wait and challenge a future 3M Plan because, as Benson-Etcheverry note: “The appeal as to Ruling No. 6127 can result in vacating the Ruling, among other remedies. However, appeal of the 3M Plan can only result in vacating the Plan.” In other words, challenging the sufficiency of a later developed mitigation plan cannot undo a decision to grant applications for a proposed use or change that may have been erroneous. And allowing the State Engineer to grant applications conditioned upon development of a future 3M Plan when the resulting appropriations would otherwise conflict with existing rights, could potentially violate protestants’ rights to a full and fair hearing on the matter, a rule rooted in due process. *Revert*, 95 Nev. at 787, 603 P.2d at 264.

Furthermore, the State Engineer’s decision to grant an application must be sufficiently explained and supported to allow for judicial review. *Id.*, 603 P.2d at 265; *see also Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708 (11th Cir. 1986) (even under deferential substantial evidence review, courts must not merely “rubber stamp” agency action: they must determine that the “agency articulated a rational connection between the facts presented” and the decision) (internal quotation omitted). The State Engineer thus may

not defer the determination of what mitigation would encompass to a later date: even if he may grant applications where the resulting appropriations would conflict with existing rights based upon the finding that the applicant would be able to successfully mitigate that deleterious effect, an assumption we do not adopt today, the finding must be based upon evidence in the record to support that mitigation would be successful and adequate to fully protect those existing rights. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 276, 236 P.3d 10, 18-19 (2010) (law requiring local governments to make a finding about plans for adequate services and infrastructure prior to amending a master plan to allow further development “require[d] something more than the deferral of the issue or broad, evasive conclusions about how officials can build or expand utilities if necessary”).

### III.

In sum, substantial evidence does not support the State Engineer’s finding that KVR would be able to “adequately and fully” mitigate the fact that its groundwater appropriations will cause Kobeh Valley springs that sources existing rights to cease to flow. The State Engineer’s decision to grant KVR’s applications, when the result of the appropriations would conflict with existing rights, and based upon unsupported findings that mitigation would be sufficient to rectify the conflict, violates the Legislature’s directive that the State Engineer must deny use or change applications when the use or change would conflict with existing rights. NRS 533.370(2). As appellants have met their burden to show the State Engineer’s decision was incorrect, NRS 533.450(10), the State Engineer’s decision to grant KVR’s applications cannot stand.

We therefore reverse and remand these matters to the district court for proceedings consistent with this opinion.<sup>4</sup> Because we reverse and remand on this basis, we do not reach the remaining issues raised in these consolidated appeals.

Pickering, J.  
Pickering

We concur:

Hardesty, C.J.  
Hardesty

Douglas, J.  
Douglas

Saitta, J.  
Saitta

Parraguirre, J.  
Parraguirre

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

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<sup>4</sup>From the record and Ruling 6127, it is unclear which of KVR's applications for proposed use or change in Kobeh Valley, if it can be pinpointed, is the appropriation that will cause the springs to dry up. Therefore, we must overturn the entire decision.