

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

THE STATE OF NEVADA STATE  
ENGINEER, et. al.  
Appellants,

v.

EUREKA COUNTY, et. al.  
Respondents.

No. 70157

DOCKETING STATEMENT  
CIVIL APPEALS

AMENDED

**FILED**

MAY 24 2016

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

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.

Revised December 2015

Docket 70157 Document 2016-15510-

FILED PER 5/24/16 ORDER

16-16294

1. Judicial District Seventh Department Two

County Eureka Judge Fairman

District Ct. Case No. CV1108-155; CV1108-156; CV1108-157; CV1112-164; CV1112-165

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

Attorney Paul Taggart, Esq. Telephone (775)882-9900

Firm Taggart & Taggart, Ltd.

Address 100 North Carson Street  
Carson City, NV 89701-4717

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 Karen A. Peterson, Esq. Telephone (775)687-0202

Firm Allison MacKenzie, Pavlakis, Wright & Fagan, Ltd.

Address 402 N. Division St.  
P.O. Box 646

Client(s) Eureka County

Attorney Dawn Ellerbrock, Esq. Telephone (775)687-0202

Firm Allison MacKenzie, Pavlakis, Wright & Fagan, Ltd.

Address 402 N. Division St.  
P.O. Box 646

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:

Prior proceedings in this Court: Eureka Co. et. al. v. State Engineer, case no. 61324 and Etcheverry et. al. v. State Engineer case no. 63258.

Pending appeals related to current appeal: N/A.

**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 2.

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

This is an appeal of Seventh Judicial District Court March 9, 2015 Amended Order Granting Objection to Proposed Order Remanding to State Engineer; Order Granting Petitions for Judicial Review; 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 Ranch by the State Engineer.

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

Whether the district court properly complied with the Nevada Supreme Court's instructions on remand.

**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 captioned State Engineer et. al. v. Eureka County et. al. as case no. 70157.

**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: This appeal addresses the District Court's interpretation of the Nevada Supreme Court's decision and the District Court's exercise of the executive authority in violation of the Nevada Constitution Article 3, Section 1, NRS 533, NRS 233B.130.

**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:

Jurisdiction over this case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9) administrative agency appeals involving water.

**14. Trial.** If this action proceeded to trial, how many days did the trial last? 0

Was it a bench or jury trial? N/A

**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:

N/A

**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 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 a Notice of Appeal with this Court on April 12, 2015.

**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)(1)

**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(8)</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 Morrisison; 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:

N/A

**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 Ruling 6127 was arbitrary, capricious, and not supported by law.

Appellants opposed Respondent'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:

N/A

(b) Specify the parties remaining below:  
N/A

(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)):**  
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 16, 2016

Date

Paul G. Taggart, Esq.

Name of counsel of record



Signature of counsel of record

Carson City, Nevada

State and county where signed

## CERTIFICATE OF SERVICE

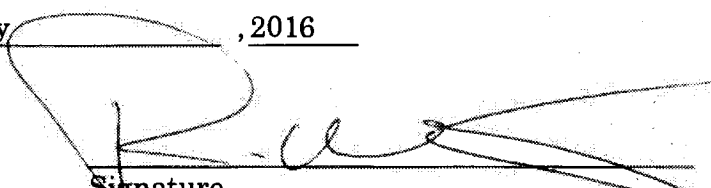
I certify that on the 16th day of May, 2016, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ 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 Peterson, Esq., Dawn Ellenbrock, Esq., Theodore Beutel, Esq., Laura A. Schroeder, Esq., Therese A. Ure, Esq., Francis M. Wikstrom, Gregory H. Morrison, Micheline Fairbanks

See attachment 14 for addresses

Dated this 16th 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                     | List of Attorneys Representing Respondents  |
| 2                     | Pending and Prior Proceedings in Other Courts, Question 7 of the Docketing Statement  |
| 3                     | Amended Order   |
| 4                     | Notice of Entry of Amended Order  |
| 5                     | Kobeh Valley Ranch, LLC Motion to Alter or Amend Judgment   |
| 6                     | Etcheverry Petition for Judicial Review CV1207-178  |
| 7                     | Benson Petition for Judicial Review CV1202-170  |
| 8                     | Benson Amended Petition for Judicial Review CV1112-165  |
| 9                     | Benson Petition for Judicial Review CV1108-157  |
| 10                    | Eureka County Petition for Judicial Review CV1108-155   |
| 11                    | Eureka County Supplemental Petition for Judicial Review CV1112-164  |
| 12                    | Conley Land and Livestock, LLC Verified Petition for Writ of Prohibition, Complaint and Petition for Judicial Review CV1108-156 |
| 13                    | 131 Nev. Adv. Op. 84 (2015)   |
| 14                    | Certificate of Service with Addresses   |

## **Attachment 1**

## ATTACHMENT 1

### Paragraph 3: Attorneys Representing Respondents

The following are additional attorneys who are representing various respondents.

Laura A. Schroeder, Esq.

Therese A. Ure, Esq.

Schroeder Law Offices, P.C.

440 Marsh Ave.

Reno, NV 89509

(775) 786-8800

Attorneys for Michael and Margaret Ann Etcheverry Family, LP and  
Diamond Cattle Company, LLC

Theodore Beutel, Esq.

701 South Main Street

P.O. Box 190

Eureka, NV 89316

(775)237-5315

Eureka County

Kenneth F. Benson

P.O. Box 158

Eureka, NV 89316

(755)237-5437

Appearing in *pro se*

## **Attachment 2**

## **Attachment 2**

### **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 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 Deane

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,  
KOBEL 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  
5 ETCHEVERRY FAMILY, LP, a Nevada  
6 registered foreign limited partnership,

7 Petitioners,

8 v.

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

14 Respondent.

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

17 Petitioner,

18 v.

19 STATE OF NEVADA, EX. REL., STATE  
20 ENGINEER, DIVISION OF WATER  
21 RESOURCES,

22 Respondent.

23 KENNETH F. BENSON, an individual,  
24 DIAMOND CATTLE COMPANY, LLC, a  
25 Nevada limited liability company, and  
26 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,

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.

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

25  
26 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.

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.*

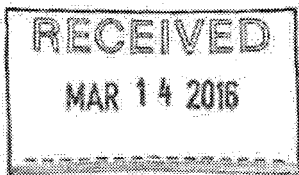


1 77171, 77525, 77526, 77527, 77553, 78424, 79911, 79912, 79913, 79914, 79915, 79916,  
2 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928,  
3 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940,  
4 79941 and 79942 are hereby **DENIED** 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.

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10 \_\_\_\_\_  
11 DISTRICT JUDGE  
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SEVENTH JUDICIAL DISTRICT COURT  
GARY D. FAIRMAN  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA



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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 Alexane

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

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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.

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

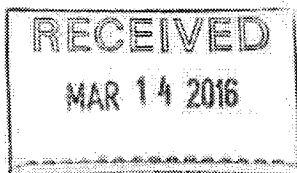
Ross E. De Lipkau, Esq.  
John R. Zimmerman, Esq.  
Parson, Behle & Latimer  
50 West Liberty Street, Suite 750  
Reno, Nevada 89501

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

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



## **Attachment 4**

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 Amerdacker

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

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

15  
16 vs. Petitioner,

Case No.: CV1108-155

Dept. No.: 2

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

22 Respondents. /

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

26 vs. Petitioners/Plaintiffs,

Case No.: CV1108-156

Dept. No.: 2

27 THE OFFICE OF THE STATE ENGINEER  
28 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/Defendants. /

///

///

///

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,

8 vs.

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

16 Respondents. /

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

19 Petitioner,

20 vs.

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

26 Respondents. /

27 KENNETH F. BENSON, an individual,  
28 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, and KOBEH  
VALLEY RANCH, LLC, a Nevada limited  
liability company,

Respondents. /

Case No.: CV1108-157

Dept. No.: 2

Case No.: CV1112-164

Dept. No.: 2

Case No.: CV1112-165

Dept. No.: 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 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

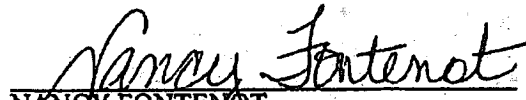
Ross E. de Lipkau, Esq.  
John R. Zimmerman, Esq.  
Francis Mark Wikstrom, Esq.  
Parsons Behle & Latimer  
50 West Liberty Street, Suite 750  
Reno, Nevada 89501

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

**EXHIBIT “1”**

**EXHIBIT “1”**

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

MAR 16 2016

Eureka County Clerk

By Q. R. R. R.

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,  
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**

SEVENTH JUDICIAL DISTRICT COURT  
GARY D. FAIRMAN  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA



SEVENTH JUDICIAL DISTRICT COURT

GARY D. FAIRMAN

DISTRICT JUDGE

DEPARTMENT 2

WHITE PINE, LINCOLN AND EUREKA COUNTIES

STATE OF NEVADA



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,

5 Petitioners,

6 v.

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

12 Respondent.

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

15 Petitioner,

16 v.

17 STATE OF NEVADA, EX. REL., STATE  
18 ENGINEER, DIVISION OF WATER  
19 RESOURCES,

20 Respondent.

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,

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,

7 Petitioners,

8 v.

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

22 vs.

23 STATE ENGINEER OF NEVADA,  
24 OFFICE OF THE STATE ENGINEER,  
25 DIVISION OF WATER RESOURCES,  
26 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.*

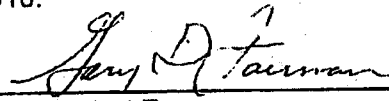


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77171, 77525, 77526, 77527, 77553, 78424, 79911, 79912, 79913, 79914, 79915, 79916,  
79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928,  
79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939,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

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

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

  
DISTRICT JUDGE

RECEIVED

MAR 15 2016

## **Attachment 5**

MAR 25 2016

Eureka County Clerk

By

*Q. Pearson*

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

5 DEPT. NO.: II

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 subdivision of the  
 State of Nevada,

10 Petitioner,

11 vs.

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

14 Respondent.

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

17 Petitioners,

18 vs.

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

23 Respondents.

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

28 Petitioners,

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

Taggart & Taggart, Ltd.  
 108 North Main Street  
 Carson City, Nevada 89703  
 (775) 883-9900 - Telephone  
 (775) 883-9900 - Facsimile

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.

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

4 Respondent.

5  
6 COMES NOW, Real Party in Interest, KOBEH VALLEY RANCH, LLC (hereinafter  
7 "KVR"), by and through its attorneys of record, PAUL G. TAGGART, ESQ. and DAVID H.  
8 RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and, pursuant to NRCP 59(e),  
9 hereby files this Motion to Alter or Amend this Court's March 9, 2016 Order granting Objection to  
10 Proposed Order Remanding to State Engineer; Order Granting Petitions for Judicial Review; and  
11 Order Vacating Permits. This Motion is based on the attached Memorandum of Points and  
12 Authorities, all papers and pleadings on file in this matter, and any oral argument that this Court may  
13 permit.  
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Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89703  
(775) 882-9900 ~ Telephone  
(775) 883-9900 ~ Facsimile

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PROCEDURAL BACKGROUND AND HISTORY**

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

10 To develop the mine, several water applications were filed with the State Engineer to appropriate  
11 new water rights and change the point of diversion, place of use, and/or manner of use of existing water  
12 rights (collectively hereinafter "Applications").<sup>1</sup> The applications sought a total combined duty of  
13 11,300 afa of groundwater for mining and milling purposes associated with the proposed mine. The  
14 Applications were protested by various parties including Eureka County.

15 KVR has expended significant time and resources in pursuit of the Applications, including three  
16 separate trips through this Court. In October 2008, the State Engineer conducted five days of hearings  
17 on the applications and, six months later, issued a ruling granting most of them. Eureka County and  
18 other protesters appealed that determination. This Court subsequently vacated the ruling and remanded  
19 the case back to the State Engineer for additional proceedings. The State Engineer conducted a second  
20 round of hearings in December 2010 and May 2011. On July 5, 2011 the State Engineer issued Ruling  
21 6127 granting KVR 11,300 afa of groundwater rights. The Ruling was conditioned on the submission of  
22 a monitoring, management, and mitigation plan (hereinafter "3M Plan").

23 The Protestants again appealed the State Engineer's grant of the Applications. While the appeal  
24 was pending, in October 2011, KVR submitted a draft 3M Plan to the State Engineer. Although 3M  
25 Plans are regularly prepared in conjunction with large water rights projects, there is no statute or  
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27 

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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  
28 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

26  
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.

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Taggart & Taggart, Ltd.  
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Carson City, Nevada 89703  
(775)882-9900 - Telephone  
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**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.  
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By: 

PAUL G. TAGGART, ESQ.  
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Attorneys for Real Party in Interest

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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  
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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 29<sup>th</sup> day of March, 2016.

  
Employee of TAGGART & TAGGART, LTD.

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## **Attachment 6**

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 IN AND FOR THE COUNTY OF EUREKA

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

19 Petitioners,

20 v.

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

26 Respondent.

PETITION FOR JUDICIAL REVIEW

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



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Reno, NV 89509  
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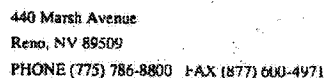
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1 **BACKGROUND**

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 ///





1       20.    The STATE ENGINEER's approval of the 3M Plan results in impermissible  
2 delegation of administrative authority to an outside committee.

3       21.    The STATE ENGINEER's approval of the 3M Plan constitutes impermissible ad  
4 hoc rulemaking, in violation of NRS 534.110 and/or NRS 532.110, that establishes an additional  
5 administrative remedy that must be exhausted by Petitioners in order to receive relief in the form  
6 of mitigation.

7       22.    The 3M Plan is deficient in one or more of the following ways, thereby rendering  
8 it incapable of serving as "conditions" to monitor and mitigate conflicts with existing rights:

9           a) The 3M Plan is premised upon funding and implementation by unknown third  
10 party non-applicants that must act unanimously prior to taking action under the  
11 3M Plan;

12          b) The 3M Plan is not reasonably calculated to timely address urgent mitigation  
13 needs, conflicts or grievances;

14          c) The 3M Plan is vague and aspirational and fails to expressly articulate what  
15 mitigation measures will be taken to avoid conflicts with existing rights on Koebe  
16 Basin valley floor; and

17          d) The 3M Plan offers only non-binding "potential" mitigation measures, many of  
18 which are better characterized as speculative or remedial in nature.

#### 19                                   REQUEST FOR RELIEF

20       WHEREFORE, Petitioner requests judgment as follows:

- 21       1.    The Court vacate the STATE ENGINEER's approval of the 3M Plan.
- 22       2.    The Court enter an order instructing the STATE ENGINEER to disallow water  
23 use under Permit Nos. 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548,  
24 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993,  
25 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004,  
26 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, 76990, 76802, 76803,




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.



Laura A. Schroeder, NSB #3595

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*Attorneys for the Petitioners*




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**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.

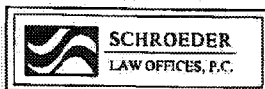
Reno, NV 89509

PHONE: (775) 786-8800

FAX: (877) 600-4971

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

*Attorneys for Petitioners*





## **Attachment 7**

NO. FILED

FEB 02 2012

Eureka County Clerk  
By J. Annan

1 CASE NO.: CV1202-170

2 DEPT. NO.: 2

3 SCHROEDER LAW OFFICES, P.C.

Laura A. Schroeder, Nevada State Bar #3595

4 Therese A. Ure, Nevada State Bar #10255

Cortney D. Duke, Nevada State Bar #10573

5 440 Marsh Ave.

Reno, Nevada 89509-1515

6 PHONE: (775) 786-8800, FAX: (877) 600-4971

counsel@water-law.com

7 Attorneys for the Petitioners

8  
9 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF EUREKA

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

15 Petitioners,

16 v.

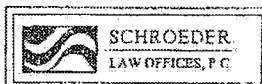
17 STATE ENGINEER, OF NEVADA,  
18 OFFICE OF THE STATE ENGINEER,  
19 DIVISION OF WATER RESOURCES,  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES,

20 Respondent.

PETITION FOR JUDICIAL REVIEW

21  
22 COME NOW Petitioners KENNETH F. BENSON, DIAMOND CATTLE COMPANY,  
23 LLC, and MICHEL AND MARGARET ANN ETCHVERRY FAMILY LIMITED  
24 PARTNERSHIP (collectively referred to herein as "Petitioners"), by and through their attorneys  
25 of record, Schroeder Law Offices, P.C., and file and petition this Court for judicial review.

26 ///



1 Petitioners petition and allege as follows:

2 JURISDICTION AND PARTIES

3 1. Kenneth F. 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, and in Diamond Valley, 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 1112-165,  
26 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.

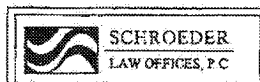
12. The Applications, a combination of applications for new appropriations of water and applications to change the point of diversion, place of use, and/or manner of use of existing water rights, requested a total combined duty under all of the Applications of 11,300 acre feet annually (afa).

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.

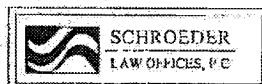
19 21. On January 4, 2012, the STATE ENGINEER issued Amended Permits 76008,  
20 76802, 76803, 76804, 76805, and 78424. These permits are collectively referred to herein as  
21 "Permits."

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:

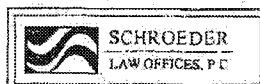
20       1.     The Court to vacate and remand the Amended Permits numbered: 76008, 76802,  
21 76803, 76804, 76805, and 78424 to the STATE ENGINEER with instructions to deny the  
22 underlying applications; and

23     ///

24     ///

25     ///

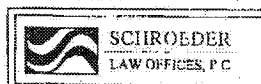
26     ///



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

SCHROEDER LAW OFFICE, P.C.

Courtney D. Duke  
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 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

Cortney D. Duke, NSB #10573

440 Marsh Ave.

Reno, NV 89509

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FAX: (877) 600-4971

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

*Attorneys for Petitioners*





## **Attachment 8**

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

JAN 17 2012

Eureka County Clerk  
by *Therese A. Ure*

1 CASE NO.: CV1112-165

2 DEPT. NO.: 2

3 SCHROEDER LAW OFFICES, P.C.

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4 Therese A. Ure, Nevada State Bar #10255

440 Marsh Ave.

5 Reno, Nevada 89509-1515

PHONE: (775) 786-8800, FAX: (877) 600-4971

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

Attorneys for the Petitioners

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

9 IN AND FOR THE COUNTY OF EUREKA

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

14 Petitioners,

15 v.

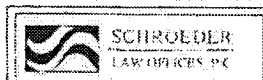
16 STATE ENGINEER, OF NEVADA,  
OFFICE OF THE STATE ENGINEER,  
17 DIVISION OF WATER RESOURCES,  
DEPARTMENT OF CONSERVATION  
18 AND NATURAL RESOURCES,

19 Respondent.

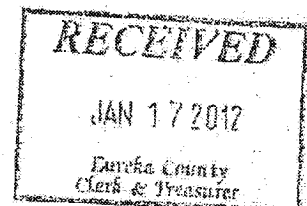
**FIRST AMENDED PETITION FOR  
JUDICIAL REVIEW**

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

26 ///



440 Marsh Avenue  
Reno, NV 89509  
PHONE: (775) 786-8800, FAX: (877) 600-4971



1 Petitioners petition and allege as follows:

2 JURISDICTION AND PARTIES

3 1. Kenneth F. 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 Kobreh Valley Ranch LLC (collectively herein the "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobreh 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.

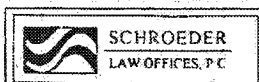
13. On July 15, 2011, the STATE ENGINEER issued Ruling 6127 granting the majority of the Applications subject to certain terms and conditions.

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.

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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 12th day of January, 2012.

SCHROEDER LAW OFFICE, P.C.

Laura A. Schroeder, NSB #3595  
Therese A. Ure, NSB #10255  
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*

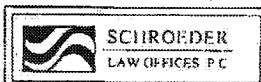


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DATED this 12th day of January, 2012.

June

Laura A. Schroeder, NSB #3595  
Therese A. Ure, NSB #10255  
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*





1 **CERTIFICATE OF SERVICE**

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

5  
6 Karen A. Peterson  
7 Allision, Mackenzie, Pavlakis, Wright &  
8 Fagan Ltd.  
9 P.O. Box 646  
10 Carson City, NV 89701

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

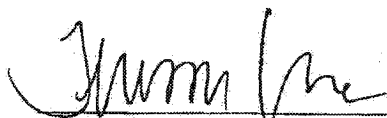
11 Ross E. de Lipkau, Esq.  
12 Michael R. Kealy, Esq.  
13 Parsons, Behle & Latimer  
14 50 West Liberty Street, Suite 750  
15 Reno, NV 89501

Bryan L. Stockton, Esq.  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, NV 89701

16 Theodore Buetel, Esq.  
17 Eureka County District Attorney  
18 701 South Main Street  
19 P.O. Box 190  
20 Eureka, Nevada 89316

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

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



22 THERESE A. URE, NSB# 10255  
23 Schroeder Law Offices, P.C.  
24 440 Marsh Avenue  
25 Reno, NV 89509  
26 PHONE (775) 786-8800; FAX (877) 600-4971  
[counsel@water-law.com](mailto:counsel@water-law.com)  
*Attorneys for Protestant Kenneth F. Benson,  
Diamond Cattle Company LLC, and Etcheverry  
Family LP*



## **Attachment 9**

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

FILED

AUG 11 2011

Eureka County Clerk  
By Sharon Carter

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 IN AND FOR THE COUNTY OF EUREKA

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

20 v.

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

26 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 ///

Page 1 - PETITION FOR JUDICIAL REVIEW



440 Marsh Avenue  
Reno, NV 89509  
PHONE (775) 786-8800 FAX (877) 600-4971

RECEIVED  
EX-1111

Docket 61324 Document 2012-25168

## 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



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

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

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

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

| Applicant's<br>Application | Based on<br>Changes to<br>Application | CFS Requested<br>by Applicant | AFA Requested<br>by Applicant | Applicant's Point<br>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 12. Martin Etcheverry on behalf of himself, the Michel and Margaret Ann Etcheverry  
13 Family LP, and the Diamond Cattle Company, LLC, and as a witness for Eureka County,  
14 testified at the administrative hearing on December 9, 2010, in opposition to the Applications.  
15

16 13. At trial, Martin Etcheverry testified at length as to the draw down of streams,  
17 creeks and wells as a direct result of the Applicant's water availability testing.  
18

19 14. Etcheverry LP, the landowner to real property with water rights of use, has  
20 entered into a long term lease agreement with Diamond Cattle to operate the farming and  
21 ranching operation. This lease includes long term rights to the United States, Department of  
22  
23  
24  
25  
26



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.



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

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

9        22.    Petitioner Benson has exhausted his administrative remedies.

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

13       WHEREFORE, Petitioners request relief as follows:

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

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

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

SCHROEDER LAW OFFICE, P.C.

  
Laura A. Schroeder, NSB #3595

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



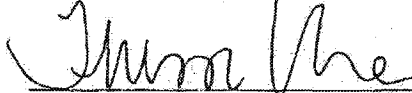


1 **AFFIRMATION**

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

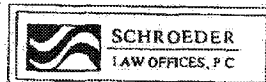
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*Attorneys for Petitioners*



## **Attachment 10**

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

Case No. CV1108-155

Dept. No. 2

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

AUG 08 2011

Eureka County Clerk  
*Shannah Cash*

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

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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.

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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  
402 North Division Street  
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-and-

ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
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E-Mail Address: law@allisonmackenzie.com

**EUREKA COUNTY DISTRICT ATTORNEY**

701 South Main Street

P.O. Box 190

Eureka, NV 89316

Telephone: (775) 237-5315

Facsimile: (775) 237-6005

By: 

**THEODORE BEUTEL, ESQ.**

Nevada State Bar No. 5222

Attorneys for Petitioner,  
EUREKA COUNTY

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.

EUREKA COUNTY DISTRICT ATTORNEY  
701 South Main Street  
P.O. Box 190  
Eureka, NV 89316  
Telephone: (775) 237-5315  
Facsimile: (775) 237-6005

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

Attorneys for Petitioner,  
EUREKA COUNTY

ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.  
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Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com



## **Attachment 11**

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 King*

1 Case No. CV1112-164

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

3

4

5

6

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

8

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

Petitioner,

11 vs.

**PETITION FOR JUDICIAL  
REVIEW**

(Exempt from Arbitration:  
Judicial Review of  
Administrative Decision)

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

Respondent.

15

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

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Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

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 Kobreh Valley Ranch LLC (collectively herein the "Applications").  
6 The Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobreh 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

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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

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  
P.O. Box 190  
Eureka, NV 89316

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

Attorneys for Petitioner,  
EUREKA COUNTY

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

**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.**



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

NO. FILED

JAN 31 2012

Eureka County Clerk  
By *Jackie D. [Signature]*

1 Case No. CV1112-164

2 Dept. No. 2

3  
4  
5  
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.

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. 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,  
19 WRIGHT & FAGAN, LTD.  
20 402 North Division Street  
21 P.O. Box 646  
22 Carson City, NV 89702

23 -and-

24 EUREKA COUNTY DISTRICT ATTORNEY  
25 701 South Main Street  
26 P.O. Box 190  
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.

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

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

Attorneys for Petitioner,  
EUREKA COUNTY

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

## **Attachment 12**

AUG 10 2011

Eureka County Clerk  
*Jason King*

Case No. CV1108-156

Dept. II

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

\*\*\*\*\*

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

Petitioners/Plaintiffs,

vs.

THE 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  
in Interest;

Respondents/Defendants.

**VERIFIED PETITION FOR WRIT OF  
PROHIBITION, COMPLAINT AND  
PETITION FOR JUDICIAL REVIEW**

Petitioner/Plaintiffs Conley Land & Livestock LLC, a Nevada limited liability company  
("Conley") and Lloyd Morrison ("Morrison") allege as follows:

**PARTIES**

1. Respondent/Defendant Jason King is the State Engineer of the State of Nevada  
(the "State Engineer") and is sued herein in his official capacity.

2. Kobel Valley Ranch LLC ("Kobel"), a Nevada limited liability company, is an  
entity involved either directly, or indirectly through affiliated entities, in the proposed mining  
and processing of molybdenum ore at the proposed Mount Hope Mine to be located in Eureka  
County, Nevada.

1  
2 3. Conley is a Nevada limited liability company that owns water rights used in  
3 connection with its farming and ranching operations located in Eureka County, Nevada.

4 4. Morrison is an individual who owns water rights used in his farming and ranching  
5 operations located in Eureka County, Nevada.

#### 6 FACTS

7 5. In connection with the development of the proposed Mount Hope Mine, Kobeh or  
8 its predecessor in interest filed numerous applications to appropriate underground water for  
9 mining, milling and dewatering purposes.

10 6. In connection with the development of the proposed Mount Hope Mine, Kobeh  
11 filed numerous applications to change the point of diversion, place of use and manner of use of  
12 several permits and/or certificates previously issued by the Nevada State Engineer.

13 7. In connection with the development of the proposed Mount Hope Mine, Kobeh  
14 filed numerous applications to change the point of diversion, place of use and/or manner of use  
15 of several previously filed applications to appropriate that had never been permitted by the  
16 Nevada State Engineer, including, but not necessarily limited to Application Nos. 76802 through  
17 76805; Application Nos. 77171, 77174 and 77175; Application Nos. 77525 through 77527;  
18 Application No. 77553; Application No. 78424 and Application Nos. 79911 through 79942.

19 8. Conley and/or Morrison timely protested several of the applications filed by  
20 Kobeh and/or its predecessor described in paragraphs 5 through 7 above.

21 9. The State Engineer issued Ruling No. 6127 on July 15, 2011. A true and correct  
22 copy of Ruling No. 6127 is attached hereto as Exhibit A. Ruling No. 6127 granted most of the  
23 applications described in paragraphs 5 through 7 above subject to certain conditions (the  
24 "Approved Applications"). Conley and Morrison are aggrieved by and their interests are  
25 injuriously affected by Ruling No. 6127.

26 10. As more particularly described below, Ruling No. 6127 in part exceeds the  
27 jurisdiction of the State Engineer, is contrary to law, made upon unlawful procedure, clearly  
28

1 erroneous in view of the reliable, probative and substantial evidence, and arbitrary, capricious  
2 and characterized by an abuse of discretion.

3  
4 **PETITION FOR WRIT OF PROHIBITION**

5 11. Conley and Morrison reallege paragraphs 1 through 10 as though set forth in full  
6 herein.

7 12. The State Engineer has only such authority as is granted by the Nevada Revised  
8 Statutes.

9 13. NRS 533.345 authorizes applications to change the point of diversion, place of  
10 use and/or manner of use of "water already appropriated."

11 14. NRS 533.324 defines "water already appropriated" to include "water for whose  
12 appropriation the State Engineer has issued a permit." The definition does not include, nor could  
13 it under relevant law, an application to appropriate water which under NRS 533.325 is not an  
14 appropriation of water.

15 15. In Ruling No. 6127, the Nevada State Engineer purports to approve change  
16 applications to change the point of diversion, place of use and/or manner of use of applications to  
17 appropriate water.

18 16. In granting applications to change the point of diversion, place of use and/or  
19 manner of use of applications to appropriate water in Ruling No. 6127 the Nevada State Engineer  
20 exceeded his jurisdiction.

21 17. Conley and Morrison have no plain, speedy and adequate remedy in the ordinary  
22 course of the law.

23 18. The State Engineer should be restrained from any further proceedings related to  
24 any application to change the point of diversion, place of use and/or manner of use of an  
25 application to appropriate until such time as permits have been issued under the initial  
26 applications to appropriate and new applications to change those permits once issued have been  
27 properly filed and noticed in accordance with the requirements of Nevada law.

28 WHEREFORE, Conley and Morrison pray as is hereinafter set forth.

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**COMPLAINT AND PETITION FOR JUDICIAL REVIEW**

**FIRST CLAIM FOR RELIEF**

19. Conley and Morrison reallege paragraphs 1 through 18 as though set forth in full herein.

20. Ruling No. 6127 is contrary to law in purporting to approve applications to change the point of diversion, place of use and/or manner of use of applications to appropriate that have never been previously permitted by the State Engineer.

WHEREFORE, Conley and Morrison pray as is hereinafter set forth.

**SECOND CLAIM FOR RELIEF**

21. Conley and Morrison reallege paragraphs 1 through 20 as though fully set forth herein.

22. Ruling No. 6127 recognizes that the use of water under the Approved Applications may conflict with and/or impact certain existing water rights. The State Engineer nevertheless issued the Approved Applications by finding that Kobeh could mitigate these impacts after they occur.

23. NRS 533.370(2) prohibits the State Engineer from approving an application where the proposed use conflicts with existing rights.

24. The State Engineer has acted contrary to law and abused his discretion by issuing the Approved Applications when he has found that they may conflict with and/or impact existing water rights.

WHEREFORE, Conley and Morrison pray as is hereinafter set forth.



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**THIRD CLAIM FOR RELIEF**

25. Conley and Morrison reallege paragraphs 1 through 24 of this Complaint as though set forth in full herein.

26. In Ruling No. 6127 the State Engineer concluded that the proposed use of water under the Approved Applications did not threaten to prove detrimental to the public interest even though substantial evidence to the contrary was admitted into the administrative record.

27. The State Engineer's finding in Ruling No. 6127 that the use of water under the Approved Applications would not threaten to prove detrimental to the public interest is contrary to law, clearly erroneous in view of the reliable, probative and substantial evidence, and arbitrary, capricious and characterized by an abuse of discretion.

WHEREFORE, Conley and Morrison pray as is hereinafter set forth.

**FOURTH CLAIM FOR RELIEF**

28. Conley and Morrison reallege paragraphs 1 through 27 as though set forth in full herein.

29. In Ruling No. 6127 the State Engineer concluded that the proposed use of water under the Approved Applications did not violate Nevada Law even though substantial evidence to the contrary was admitted into the administrative record.

30. The State Engineer's finding in Ruling No. 6127 that the use of water under the Approved Applications would not violate Nevada Law is contrary to law, clearly erroneous in view of the reliable, probative and substantial evidence, and arbitrary, capricious and characterized by an abuse of discretion.

WHEREFORE, Conley and Morrison pray as is hereinafter set forth.

**FIFTH CLAIM FOR RELIEF**

31. Conley and Morrison reallege paragraphs 1 through 30 as though set forth in full herein.

32. The determinations made by the State Engineer concerning the facts required to support the import of water from the Koberh Valley Basin into the Diamond Valley Basin and

1 with respect to the State Engineer's interpretation of the relevant provisions of NRS 533.370(6)  
2 (now NRS 533.370(3)) are not supported by substantial evidence in the record and are contrary  
3 to law.  
4

5 WHEREFORE, Conley and Morrison pray as follows on their Petition for Writ of  
6 Prohibition:

7 1. For a finding that the State Engineer acted without or exceeded his jurisdiction in  
8 Ruling No. 6127 by purporting to approve applications to change the point of diversion, place of  
9 use and/or manner of use of applications to appropriate water;

10 2. For a writ of prohibition restraining the State Engineer from taking any further  
11 action or proceedings related to any such application to change the point of diversion, place of  
12 use and/or manner of use of an application to appropriate and vacating Ruling No. 6127 with  
13 respect to any action taken by the State Engineer on applications to change the point of  
14 diversion, place of use and/or manner of use of applications to appropriate and directing that any  
15 such change applications be filed anew and noticed in accordance with Nevada law after and to  
16 the extent that the change requested relates to a properly issued permit to appropriate;

17 3. For costs of suit and reasonable attorneys' fees; and

18 4. For such other and further relief as this Court deems just and equitable.

19 WHEREFORE, Conley and Morrison pray as follows on their First through Fifth Claims  
20 for Relief of the Complaint and Petition for Judicial Review:

21 1. Vacating Ruling No. 6127;

22 2. Ordering the Nevada State Engineer to deny the Approved Applications.

23 3. For costs of suit and reasonable attorneys' fees; and

24 4. For such other and further relief as this Court deems just and equitable.  
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**AFFIRMATION**

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

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

WOODBURN AND WEDGE  
6100 Neil Road, Suite 500  
Reno, NV 89511  
(775) 688-3000

By: Dale E. Ferguson  
GORDON H. DEPAOLI  
DALE E. FERGUSON  
Attorneys for Petitioner/Petitioners/Plaintiffs  
Conley Land & Livestock Limited Liability  
Company and Lloyd Morrison

VERIFICATION

Dale E. Ferguson, being first duly sworn, deposes and says:

1. I am one of the attorneys for Conley Land & Livestock LLC and Lloyd Morrison, Petitioner/Plaintiffs in the referenced matter.

2. I am currently licensed to practice law in the State of Nevada.

3. Conley Land & Livestock LLC and Lloyd Morrison reside in Eureka, Nevada and the offices of their attorneys in this matter, Woodburn and Wedge, are located in Reno, Nevada. As a result, I have prepared and executed this verification for the Verified Petition for Writ of Prohibition, Complaint and Petition for Judicial Review (the "Verified Petition"). Furthermore, the facts on which the Verified Petition is based are within my knowledge.

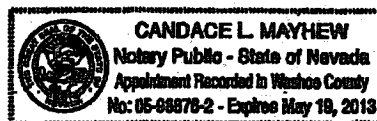
4. I have reviewed the allegations of the Verified Petition and they are true and accurate to the best of my knowledge and belief.

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

By: Dale E. Ferguson  
DALE E. FERGUSON

SUBSCRIBED and sworn to before me this 10<sup>th</sup> day of August, 2011.

Candace L. Mayhew  
Notary Public



# **EXHIBIT A**

**EXHIBIT A**

**IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA**

IN THE MATTER OF APPLICATIONS 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, 76483, 76484, )  
76485, 76486, 76744, 76745, 76746, 76802, 76803, )  
76804, 76805, 76989, 76990, 77171, 77174, 77175, )  
77525, 77526, 77527, 77553, 78424, 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, AND 79942 FILED TO APPROPRIATE OR TO )  
CHANGE THE POINT OF DIVERSION, PLACE OF )  
USE AND MANNER OF USE OF THE PUBLIC )  
WATERS OF UNDERGROUND SOURCES WITHIN )  
THE KOBEH VALLEY (139) AND DIAMOND )  
VALLEY (153) HYDROGRAPHIC BASINS, LANDER )  
COUNTY AND EUREKA COUNTY, NEVADA. )

**RULING**

**#6127**

**GENERAL**

**I.**

Applications 72695 thru 72698 were filed on May 3, 2005, by Idaho General Mines, Inc., later assigned to Kobeh Valley Ranch, LLC, to appropriate 22.28 cubic feet per second (cfs) each of underground water for mining and milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by David A. Stine (Conley Land and Livestock, LLC), Eureka County and Lloyd Morrison.<sup>1</sup>

Applications 73545 thru 73552 were filed on December 5, 2005, by Idaho General Mines, Inc., later assigned to Kobeh Valley Ranch, LLC, to appropriate 22.28 cfs each of underground water for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed

<sup>1</sup> File Nos. 72695 thru 72698, official records in the Office of the State Engineer.

Mount Hope Mine. The applications were protested by David A. Stine (Conley Land and Livestock, LLC), Eureka County and Lloyd Morrison.<sup>2</sup>

Application 74587 was filed on August 2, 2006, by Idaho General Mines, Inc., later assigned to Kobreh Valley Ranch, LLC, to appropriate 22.28 cfs of underground water for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. This application was not protested.<sup>3</sup>

Applications 75988 thru 76004 were filed on June 29, 2007, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 54093, Permit 54094, Permit 60281, Permit 60282, Permit 60283, Permit 60284, Permit 60285, Permit 60286, Permit 72580, Permit 72581, Permit 72582, Permit 72583, Permit 72584, Permit 72585, Permit 72586, Permit 72587, and Permit 72588. The proposed manner of use is mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>4</sup>

Applications 76005 thru 76009 were filed on June 29, 2007, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 57835, Permit 57836, Permit 57839, Permit 57840 and Permit 66062, respectively. The proposed manner of use is for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>5</sup>

Applications 76483 thru 76486 were filed on November 14, 2007, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 10426 Certificate 2782, Permit 18544 Certificate 6457, Permit 23951 Certificate 8002 and Permit 23952 Certificate 8003, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>6</sup>

<sup>2</sup> File Nos. 73545 thru 73552, official records in the Office of the State Engineer.

<sup>3</sup> File No. 74587, official records in the Office of the State Engineer.

<sup>4</sup> File Nos. 75988 thru 76004, official records in the Office of the State Engineer.

<sup>5</sup> File Nos. 76005 thru 76009, official records in the Office of the State Engineer.

<sup>6</sup> File Nos. 76483 thru 76486, official records in the Office of the State Engineer.

Applications 76744, 76745, and 76746 were filed on February 13, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of portions of Permit 13849 Certificate 4922, Permit 35866, and Permit 64616, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. Application 76744 was protested by Cedar Ranches, LLC, and Eureka County and Applications 76745 and 76746 were protested by Cedar Ranches, LLC, Eureka County and Lander County.<sup>7</sup>

Applications 76802, 76803, 76804 and 76805 were filed on March 11, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion of Applications 76005, 76006, 76007, and 76009. The proposed manner of use is for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>8</sup>

Applications 76989 and 76990 were filed on April 23, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 9682 Certificate 2780 and Permit 11072 Certificate 2880, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>9</sup>

Applications 77171, 77174 and 77175 were filed on June 20, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion of Applications 76003, 76485 and 76484, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>10</sup>

Applications 77525, 77526 and 77527 were filed on October 23, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion of Applications 75990, 75996 and 75997 (portion), respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum

<sup>7</sup> File Nos. 76744, 76745, and 76746, official records in the Office of the State Engineer.

<sup>8</sup> File Nos. 76802, 76803, 76804 and 76805, official records in the Office of the State Engineer.

<sup>9</sup> File Nos. 76989 and 76990, official records in the Office of the State Engineer.

<sup>10</sup> File Nos. 77171, 77174 and 77175, official records in the Office of the State Engineer.



ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>11</sup>

Application 77553 was filed on November 3, 2008, by Kobreh Valley Ranch, LLC, to change the point of diversion of a portion of Application 75997. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The application was protested by Eureka County.<sup>12</sup>

Application 78424 was filed on April 30, 2009, by Kobreh Valley Ranch, LLC, to change the point of diversion of Application 76803. The proposed manner of use is for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The application was protested by Eureka County.<sup>13</sup>

Applications 79911 thru 79942 were filed on June 15, 2010, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and/or manner of use of Applications 73551, 73552, 76004, 72695, 76003, 72696, 75997, 72697, 75988, 75996, 75999, 75989, 76989, 75995, 72698, 76000, 76002, 73545, 75992, 75993, 75994, 75998, 73546, 76745, 76990, 75990, 75991, 74587, 73547, 74587, 76746, 76001. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County, Lloyd Morrison, Baxter Glenn Tackett (79914, 79918, 79925), and Kenneth Benson (79934, 79935, 79936, 79937, 79938, 79939).<sup>14</sup>

## II.

Applications 72695 thru 72698 and Applications 73545 thru 73552 were timely protested by the following Protestants and on the following summarized grounds:

David Stine (Conley Land and Livestock, LLC, as Successor)<sup>1,2</sup>

- The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Kobreh Valley provides recharge to Diamond Valley and therefore, Diamond Valley water levels will decrease at an accelerated rate.

<sup>11</sup> File Nos. 77525, 77526 and 77527, official records in the Office of the State Engineer.

<sup>12</sup> File No. 77553, official records in the Office of the State Engineer.

<sup>13</sup> File No. 78424, official records in the Office of the State Engineer.

<sup>14</sup> File Nos. 79911 thru 79942, official records in the Office of the State Engineer.

- The applications list dewatering as a manner of use, but the points of diversion are at least 7 miles from the pit location. Applicant should specify actual points of diversion for dewatering.
- The mine site straddles Kobeh Valley and Diamond Valley and dewatering may involve an interbasin transfer of groundwater.
- Any application approved should be assigned a temporary status.

**Eureka County**

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- Place of use is listed as 90,000 acres and is inconsistent with stated purpose.
- The points of diversion are within Basin 139 and the place of use includes Basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6) (Interbasin transfers).
- There is no unappropriated water at the proposed source of supply, the proposed use conflicts with or will impair existing rights and protectable interests in domestic wells and threatens to prove detrimental to the public interest.
- Applicant has failed to provide the State Engineer with all relevant information required by statute.

**Lloyd Morrison**

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Over-pumping in Kobeh could stop underground recharge of Diamond Valley.

**III.**

Applications 75988 thru 76009 were timely protested by Eureka County on the following summarized grounds:<sup>4,5</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- There is no unappropriated water at the proposed source of supply, the proposed use conflicts with or will impair existing rights and protectable interests in domestic wells and threatens to prove detrimental to the public interest.
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County and others.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

**IV.**

Applications 76483 thru 76486 were timely protested by Eureka County on the following summarized grounds:<sup>6</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

**V.**

Applications 76744, 76745, and 76746 were timely protested by the following Protestants and on the following summarized grounds:<sup>7</sup>

**Eureka County**

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

**Cedar Ranches, LLC**

- There is no geologic and/or hydrologic evidence that the quantity of water exists in the mine region.

- New geologic data shows that eastern great basin carbonate aquifer ground-water system of Kobeh, Diamond, and Pine Valleys and other valleys of the region are interconnected.
- Water mining in Kobeh Valley will aggravate the over allocation of water permits in Diamond Valley.

**Lander County (76745 and 76746 only)**

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.
- Inter-basin and Inter-County transfer as proposed should be carefully examined.

**VI.**

Applications 76802, 76803, 76804 and 76805 were timely protested by Eureka County on the following summarized grounds:<sup>8</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

#### VII.

Applications 76989 and 76990 were timely protested by Eureka County on the following summarized grounds:<sup>9</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- All applications filed for this project cannot be approved as the aggregate is greater than 16,000 afa.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

#### VIII.

Applications 77171, 77174, 77175, 77525, 77526, 77527, 77553 and 78424 were timely protested by Eureka County on the following summarized grounds:<sup>10,11,12,13</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-pump the basin.
- Existing USGS reports suggests that Kobeh Valley may provide underground flow to Diamond Valley and affect existing municipal rights.
- Impact to existing stockwater and irrigation rights in Kobeh Valley and domestic wells in Diamond Valley.
- Effective monitoring and mitigation plan is necessary prior to development of any water and Eureka County should be involved in additional study, modeling and plan.
- Impacts associated with sustained pumping at the proposed points of diversion are unknown.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Compliance with the requirements of NRS § 533.370(6) must be met.
- All applications filed for this project cannot be approved as the aggregate is greater than 11,300 afa the Applicant is seeking.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.

- Only consumptive portion of base rights should be subject to change.
- Any protest hearings to be held should be in Eureka.
- The Applicant's groundwater model is not technically adequate and cannot be used as a basis to approve the applications.
- The point of diversion for Application 77553 is 1,500 feet west of the boundary between Kobeh Valley and Diamond Valley. The proposed location may suggest significant secondary permeability exists in the rocks at this locale; the well may intercept flow from Kobeh Valley to Diamond Valley.
- Hydraulic properties of the proposed point of diversion are not known.
- Further applications for the mines project should not be considered until the USGS study is complete and additional data and analysis is complete.

### IX.

Applications 79911 thru 79942 were timely protested by Eureka County and Lloyd Morrison on the following summarized grounds:<sup>14</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-pump the basin.
- Existing USGS reports suggests that Kobeh Valley may provide underground flow to Diamond Valley and effect existing municipal rights.
- Impact to existing stockwater and irrigation rights in Kobeh Valley and domestic wells in Diamond Valley.
- Effective monitoring and mitigation plan is necessary prior to development of any water and Eureka County should be involved in additional study, modeling and plan.
- There are other pending applications to appropriate water and the applicant must withdraw these applications or a decision rendered on these applications prior to ruling.
- Not all of the proposed points of diversion have been explored. Impacts associated with sustained pumping at the proposed points of diversion are unknown.
- The applicant must prove that pumping will not impact any of the sources contributing to Pete Hanson Creek and Henderson Creek.
- The proposed place of use is larger than the mine's Plan of Operations project boundary.
- Further applications for the mines project should not be considered until the USGS study is complete and additional data and analysis is complete.
- Propagation of the cones of depression from pit dewatering in Diamond Valley must be determined.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Compliance with the requirements of NRS § 533.370(6) must be met.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh Valley will likely reduce that amount and affect prior existing water rights held by Eureka County.
- All applications filed for this project cannot be approved as the aggregate is greater than 11,300 afa the Applicant is seeking.

- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.
- Any protest hearings to be held should be in Eureka.
- The applicant holds notices filed with the BLM associated with water supply exploration activities within Diamond Valley.
- Monitoring, Management and Mitigation Plan must be developed prior to approval.
- The State Engineer should conduct a full and fair hearing.
- Forfeiture of existing rights.

X.

Applications 79934 thru 79939 were timely protested by Kenneth F. Benson on the following summarized grounds:<sup>15</sup>

- Forthcoming USGS studies could indicate a greater contribution from Kobeh Valley to Diamond Valley. Possible flow of 10,000 to 12,000 acre-feet annually, if substantiated, would diminish the water balance and the mining project applications could not be supported.

XI.

Applications 79914, 79918 and 79925 were timely protested by Baxter Glenn Tackett on the following summarized grounds:<sup>16</sup>

- In summary, I protest the Application based on an ill conceived interbasin transfer of water, an erroneous definition of beneficial use of those waters and consumption for beneficial use in Kobeh Valley, and the very real potential that artesian flows in both Kobeh Valley and Antelope Valleys will be adversely affected.
- Protestant is owner and operator of Hot Springs Ranch in Antelope Valley and is concerned that artesian flows will be affected.

XII.

The applications at issue represent an attempt by the Applicant to procure sufficient water for a proposed molybdenum mine to be located near Mount Hope, approximately 25 miles northwest of the Town of Eureka, Eureka County, Nevada. The applications are a combination of new appropriations of water and change applications for existing water rights. The Applicant has amended its original request of 16,000 afa and is now requesting a total combined duty of 11,300 acre-feet annually (afa). The

<sup>15</sup> File Nos. 79934 thru 79939, official records in the Office of the State Engineer.

<sup>16</sup> File Nos. 79914, 79918 and 79925, official records in the Office of the State Engineer.

Applicant is Kobreh Valley Ranch, LLC; a company formed by General Moly, Inc. to handle, hold and control the water rights for the project.

On October 13-17, 2008, the State Engineer held an administrative hearing in the matter of applications filed to appropriate or change underground water to support the Mount Hope mining project. Some of the applications were approved and others were denied by State Engineer's Ruling No. 5966, issued March 26, 2009. The ruling was appealed to district court in accordance with NRS § 533.450. The Seventh Judicial District Court vacated Ruling No. 5966 in its Order entered April 21, 2010. Subsequently, change Applications 79911 thru 79942 were filed on applications subject to State Engineer's Ruling No. 5966. The State Engineer held a new administrative hearing on December 6, 7, 9 and 10, 2010, that included the additional Applications.

After all parties were duly noticed by certified mail, a public administrative hearing was held in Carson City, Nevada starting on December 6, 2010, in the matter of the above-referenced applications before representatives of the Office of the State Engineer.<sup>17</sup> Protestant Benson filed a Motion to adopt the previous record from the hearing of October 13-17, 2008, and the motion was unopposed.<sup>18,19</sup>

On May 10, 2011, an additional day of hearing was held to consider additional information regarding specific water usage at the proposed mining project. All parties were notified and additional testimony and exhibits were admitted as part of the record.<sup>20</sup>

### **FINDINGS OF FACT**

#### **I.**

#### **STATUTORY STANDARD TO GRANT**

The State Engineer finds that NRS § 533.370(1) provides that the State Engineer shall approve an application submitted in the proper form, which contemplates the application of water to beneficial use if the applicant provides proof satisfactory of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence, and his financial ability and reasonable

<sup>17</sup> Exhibits and Transcript, public administrative hearing before the State Engineer, December 6, 7, 9, 10, 2010, official records in the Office of the State Engineer (Hereafter, Transcript, December 2010 and Exhibits, December 2010).

<sup>18</sup> Exhibit No. 13, December 2010.

<sup>19</sup> Exhibits and Transcript, public administrative hearing before the State Engineer, October 13-17, 2008, official records in the Office of the State Engineer (Hereafter, Transcript, October 2008 and Exhibits, October 2008).

<sup>20</sup> Transcript, May 10, 2011, and Exhibit Nos. 2, 3, 4 and 5.



expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

## **II.**

### **APPLICATIONS SUBMITTED IN PROPER FORM**

The protests allege that the applications should be denied because they fail to adequately describe the proposed points of diversion and place of use. The application form used by the Division of Water Resources (Division) requires a description of the proposed point of diversion by survey description and the description must match the illustrated point of diversion on the supporting map. If and when a well is drilled, it must be within 300 feet and within the same quarter-quarter section as described or an additional change application is required. Prior to an application being published, the Division reviews incoming applications and maps to ensure statutory compliance. Any application or map that does not meet the requirements for acceptance and that cannot be corrected during the review process is rejected and returned for correction with time limits for the applicant to re-submit. The State Engineer finds that the Applicant has met the requirements for describing the points of diversion and place of use on the application forms and supporting maps. The State Engineer finds that all applications subject to this ruling have been submitted in the proper form.

## **III.**

### **FINANCIAL ABILITY, BENEFICIAL USE AND REASONABLE DILIGENCE**

Nevada water law requires the State Engineer to consider whether the Applicant has an intention in good faith to construct the work necessary to place any approved water to beneficial use. The Applicant also must show that it has the financial ability and reasonable expectation to construct the work necessary to apply the water to its beneficial use.<sup>21</sup>

The chief financial officer of General Moly, Inc. stated that the total expenditure of funds required for the project is \$1,154,000,000. The Applicant has expended about \$163,000,000 on such things as buying equipment, hydrology, drilling, engineering, permitting, land and water rights. General Moly, Inc. will provide 80% of the funding and partner POSCO, a Korean steel producer, will provide the remaining 20%. General Moly Inc. has arranged much of its financing through its Hanlong transaction. The

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<sup>21</sup> NRS § 533.370(1)(e).

Hanlong transaction includes a \$665,000,000 bank loan from a Chinese bank sourced and fully guaranteed by Hanlong Group. It also includes an \$80,000,000 purchase of 25% of General Moly's fully diluted shares, a \$20,000,000 bridging loan from Hanlong Group, and a molybdenum supply agreement. Hanlong is a private Chinese company headquartered in Sichuan Province in China with experience in mining projects. The financial ability of the Applicant is further detailed in the Applicant's financial exhibit and testimony.<sup>22</sup>

The State Engineer finds the evidence presented demonstrates that the Applicant has a reasonable expectation of financial ability to construct the work and apply the water to the intended beneficial use with reasonable diligence.

#### IV.

#### STATUTORY STANDARD TO REJECT

The State Engineer finds that NRS § 533.370(5) provides that the State Engineer shall reject an application and refuse to issue the permit where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS § 533.024, or where the proposed use threatens to prove detrimental to the public interest.

#### V.

#### UNAPPROPRIATED WATER - PERENNIAL YIELD

Nevada Revised Statute § 533.370(5) provides that the State Engineer must reject an application where there is no unappropriated water in the proposed source of supply. In determining the amount of groundwater available for appropriation in a given hydrographic basin, the State Engineer relies on available hydrologic studies to provide relevant data to determine the perennial yield of a basin. The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. If the perennial yield is exceeded, groundwater levels will decline and steady-state conditions will not be achieved, a situation commonly referred to as groundwater mining. Additionally, withdrawals of groundwater in excess of the perennial yield may contribute to adverse

<sup>22</sup> Exhibit No. 37 and Transcript, pp. 27-36, December 2010.

conditions such as water quality degradation, storage depletion, diminishing yield of wells, increase in cost due to increased pumping lifts, and land subsidence.<sup>23</sup>

The perennial yields of hydrographic basins that are part of interbasin flow systems are often difficult to establish, and in the past, groundwater has sometimes been double counted, so that the sum of the perennial yields of the basins in the flow system is more than the sum of either the evapotranspiration (ET) discharge or natural recharge of the basins in the flow system. Such is the case with the Diamond Valley groundwater flow system. The Diamond Valley flow system is comprised of seven hydrographic basins: Monitor Valley South, Monitor Valley North, Kobeh Valley, Antelope Valley, Stevens Basin, Pine Valley, and Diamond Valley.<sup>24</sup> Diamond Valley is the terminus of the groundwater flow system. Groundwater flows from South Monitor Valley to North Monitor Valley, then to Kobeh Valley, and finally to Diamond Valley. Groundwater from Antelope Valley may flow to Kobeh Valley and then to Diamond Valley. Groundwater from Stevens Basin flows to Diamond Valley and/or Antelope Valley. Groundwater from the Garden Valley area, a part of the Pine Valley Hydrographic Basin, flows to Diamond Valley.<sup>25</sup> Monitor Valley, Antelope Valley, Kobeh Valley and Diamond Valley lose much of their annually recharged groundwater to ET, and the actual amount of subsurface flow between basins is uncertain. Previous publications have estimated the amount of subsurface flow,<sup>26,27,28</sup> and the Applicant has also provided estimates of subsurface interbasin flow between selected basins.<sup>29</sup> While the estimated amount of subsurface interbasin flow may be uncertain or disputed, there is general agreement on the direction of flow. Figure 1, shown on page 16, shows basin water budgets and interbasin flows as estimated in the Reconnaissance Series reports, and for reference, also shows interbasin flow as computed by the Applicant's groundwater flow model. Monitor Valley South provides an estimated 2,000 afa of subsurface inflow to Monitor Valley North, which in turn supplies 6,000 afa of subsurface inflow to Kobeh Valley. The Applicant estimated 1,370 to 1,680 afa of subsurface flow

<sup>23</sup> State Engineer's Office, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, October 1971.

<sup>24</sup> Exhibit No. 10, October 2008.

<sup>25</sup> Exhibit No. 13, October 2008.

<sup>26</sup> Exhibit No. 17, October 2008.

<sup>27</sup> Exhibit No. 16, October 2008.

<sup>28</sup> Exhibit No. 134, December 2010.

<sup>29</sup> Exhibit No. 39, Tables 3.5-2 and 4.1-13, December 2010.

from Northern Monitor Valley to Kobeh Valley.<sup>30</sup> Subsurface flow from Kobeh Valley to Diamond Valley was estimated by Harrill to be less than approximately 40 afa.<sup>31</sup> The Applicant estimated 1,100 to 1,600 afa of subsurface flow from Kobeh to Diamond Valley.<sup>32</sup> As can be seen from Figure 1, the established perennial yields of Monitor Valley North and South, and Kobeh Valley exceed both the recharge and the ET. In Reconnaissance Report 30,<sup>33</sup> Rush and Everett recognize that substantial development in one of the basins could affect the yields of adjacent basins. The Applicant's groundwater flow model simulates ET, and ET for each basin has been tabulated in its exhibit.<sup>34</sup> However, those tabulations do not represent the result of a specific study whose goal was to re-estimate groundwater ET, and will not be used in place of the existing published water budgets from the reconnaissance reports.

To resolve these issues with interbasin flow and to establish safe and conservative perennial yields in these basins, the perennial yield of each of the basins will be equal to the basin's groundwater ET. In this way, subsurface flow into or out of a basin will not be included in its perennial yield and there will be no double counting. Water that flows in the subsurface from Kobeh Valley to Diamond Valley, however much that may be, will not be part of Kobeh Valley's perennial yield. The State Engineer hereby establishes the perennial yield of the following six basins in the Diamond Valley Flow System as follows:

| <u>Basin</u>                                | <u>Perennial Yield (acre-feet)</u> |                |
|---|------------------------------------|----------------|
|   | <u>Previous</u>                    | <u>Revised</u> |
| Monitor Valley, Southern Part - Basin 140B: | 10,000                             | 9,000          |
| Monitor Valley, Northern Part - Basin 140A: | 8,000                              | 2,000          |
| Kobeh Valley, Basin 139:                    | 16,000                             | 15,000         |
| Antelope Valley, Basin 151:                 | 4,000                              | 4,000          |
| Stevens Basin, Basin 152:                   | 100                                | 100            |
| Diamond Valley, Basin 153:                  | 30,000                             | 30,000         |

<sup>30</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>31</sup> Exhibit No. 13, October 2008.

<sup>32</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>33</sup> Exhibit No. 17, p. 26, October 2008.

<sup>34</sup> Exhibit No. 39, Table 4.1-12, December 2010.

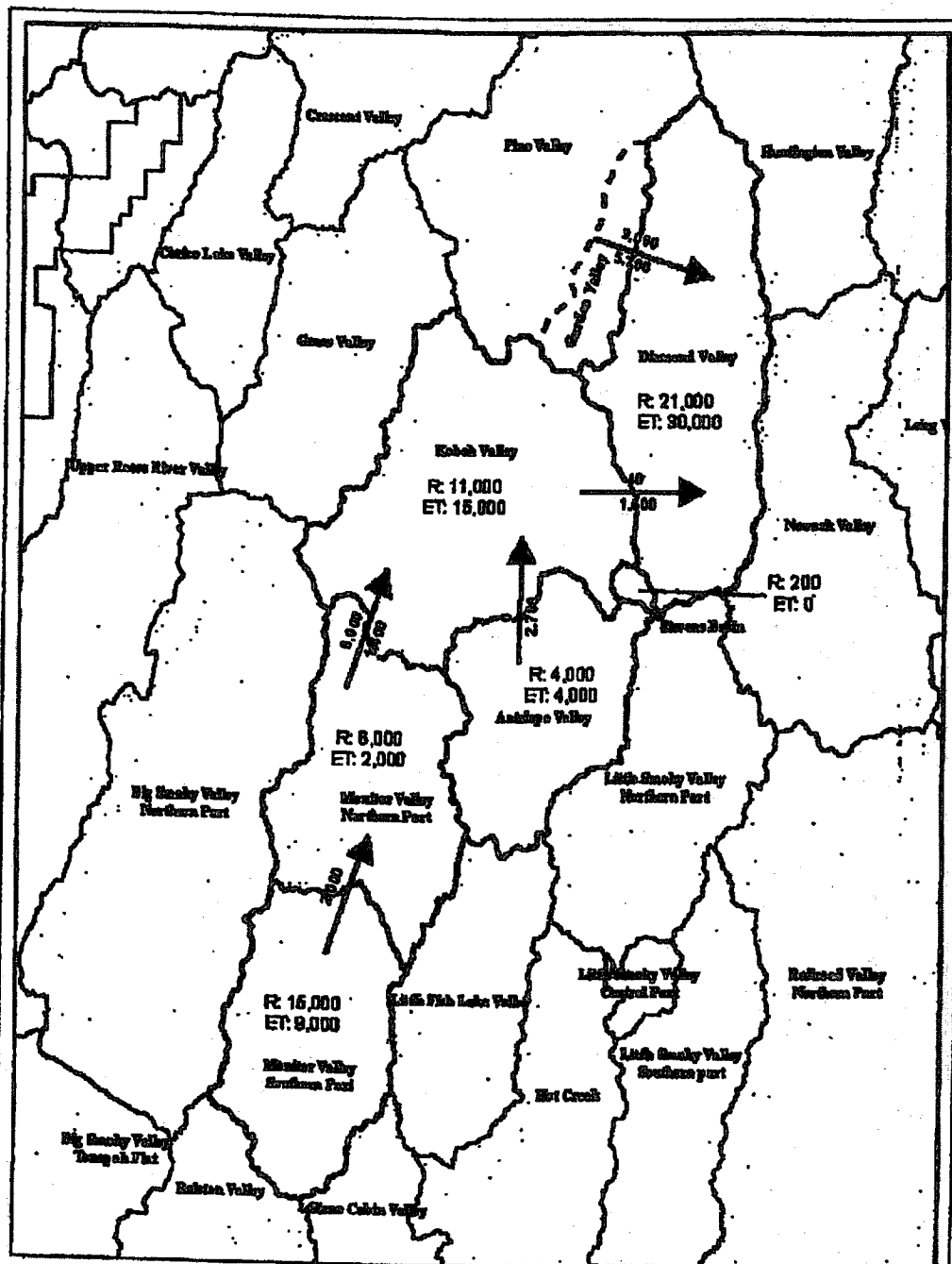


Figure 1. Hydrographic basins of the Diamond Valley groundwater flow system, showing reconnaissance report estimates of groundwater recharge and ET discharge. Arrows show estimated annual interbasin flow from both reconnaissance reports and groundwater flow model.

Interbasin groundwater flow  
Reconnaissance  
Model  
R: In-basin recharge (afa)  
ET: Evapotranspiration (afa)

Prior to the administrative hearing, the Applicant acquired nearly all of the existing groundwater rights within the Kobeh Valley Hydrographic Basin, excepting approximately 1,100 afa. The Applicant has filed new applications and change applications seeking a total combined duty of 11,300 afa from Kobeh Valley. If the subject applications were to be approved, the total committed groundwater resources in Kobeh Valley would be approximately 12,400 afa, which is less than the revised perennial yield of 15,000 afa. The State Engineer finds that there is sufficient water within the perennial yield of Kobeh Valley to satisfy the water appropriation requirements of the project. The State Engineer finds that no new appropriation of underground water is sought within Diamond Valley.

#### VI

#### CONFLICT WITH EXISTING RIGHTS OR DOMESTIC WELLS

All of the Protestants raised the issue of potential conflicts with existing rights or domestic wells. They allege there could be potential impacts to water rights in Diamond Valley due to a reduction of subsurface flow from Kobeh Valley to Diamond Valley or due to drawdown from pumping. These potential impacts were evaluated by the Applicant in both its testimony and the groundwater flow model.<sup>35</sup> In Reconnaissance Series Report No. 6,<sup>36</sup> Eakin suggests minimal subsurface flow from Kobeh to Diamond Valley through the narrow alluvium-filled gap at Devil's Gate. Harrill suggests 40 afa through the same gap.<sup>37</sup> Rush and Everett concur on the minimal flow through Devil's Gate, and go on to state that flow from Kobeh to Diamond Valley through the carbonate bedrock is possible, but found no evidence to suggest such flow occurs.<sup>38</sup> Tumbusch and Plume did not provide a revised estimate of subsurface flow from Kobeh to Diamond Valley, but did pointedly recognize the potential for flow in the carbonate bedrock as evidenced by fault structures with solution cavities in carbonate outcrops at Devil's Gate.<sup>39</sup>

The Applicant used Darcy's Law to develop a conceptual estimate of interbasin flow, and estimated 50 to 290 afa of subsurface flow from Kobeh Valley to Diamond Valley at Devil's Gate through alluvium and carbonate bedrock.<sup>40</sup> Its witnesses further estimated 810 to 1,050 afa of deep flow in bedrock from Kobeh Valley to Diamond

<sup>35</sup> Exhibit No. 39, December 2010.

<sup>36</sup> Exhibit No. 16, p. 18, October 2008.

<sup>37</sup> Exhibit No. 13, pp. 21-23, October 2008.

<sup>38</sup> Exhibit No. 17, p. 16, October 2008.

<sup>39</sup> Exhibit No. 10, p. 13, October 2008.

<sup>40</sup> Exhibit No. 39, Table 4.1-13, December 2010.

Valley in the area north of Whistler Peak.<sup>41</sup> Next, they developed a numerical groundwater flow model to simulate both pre-development steady state conditions as well as the effects of pumping on groundwater levels and interbasin flow. With the groundwater flow model, it was estimated that pre-development flow was 1,583 afa from Kobeh to Diamond Valley.<sup>42</sup> For the present-day conditions, the model indicates water table drawdown due to agricultural pumping in Diamond Valley has increased inflow from Kobeh Valley to 2,001 afa,<sup>43</sup> which is estimated to further increase to 2,365 afa in year 2055 without any mine pumpage. For its predictive analyses, the Applicant completed multiple model simulations. A 'no action' alternative simulated continued agricultural pumping through year 2105. The Applicant's 'cumulative action' alternative simulated continued agricultural pumping as in the 'no action' alternative, but also simulated the pumping of 11,300 afa in Kobeh and Diamond Valley for the 44-year mine life ending in 2055. The net effect of the mine's pumping on groundwater levels and interbasin flow is then computed as the difference between the two model simulations.<sup>44,45</sup> The analyses of the future effects of pumping, by the Office of the State Engineer, used both the Exhibit No. 39 report as well as the computer model. The model results show a 15 afa increase in subsurface flow from Kobeh to Diamond Valley as a result of the mining project and its associated pumping.<sup>46</sup> The small increase in interbasin flow was explained as the net of a 40 afa increase in Kobeh to Diamond Valley flow at the site of the open pit due to dewatering, partially offset by a 25 afa decrease in Kobeh to Diamond Valley flow along the basin boundary at Whistler Mountain.<sup>47</sup>

Water level drawdown due to simulated mine pumping is thoroughly documented.<sup>48</sup> Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. However,

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<sup>41</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>42</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>43</sup> Exhibit No. 39, Table 4.4-4, December 2010.

<sup>44</sup> Exhibit No. 39, pp. 177-178, December, 2010.

<sup>45</sup> There is a discrepancy in the naming of the alternatives. In Exhibit No. 39, pp. 177-178, the scenario that includes mine pumping is called 'cumulative action', however, the model files that simulate mine pumping are named 'base case'.

<sup>46</sup> Exhibit No. 39, Table 4.4-5 and 4.4-6, December 2010.

<sup>47</sup> Transcript, pp. 308-309, December 2010.

<sup>48</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-17, and groundwater flow model data files, December 2010.

additional drawdown at that same location due solely to continuing agricultural pumping in Diamond Valley is predicted to be about 90 feet.<sup>49</sup>

The model structure and simulation results were addressed by Protestant Eureka County's expert witnesses. Witness Bugenig testified that the model's predictive estimates of proposed mine pumping on Kobeh to Diamond Valley subsurface flow was at least approximately accurate.<sup>50</sup> Witness Oberholtzer authored a May 2010 report in which the model was described as not having fatal flaws,<sup>51</sup> but in a November 2010 report she expressed concern that the model may not be accurate enough to be used as a predictive tool.<sup>52</sup> Ms. Oberholtzer testified that calibration issues in Diamond Valley raised concern and the model had limited abilities as a predictive tool.<sup>53</sup> In general, the expert witnesses brought forward by Protestant Eureka County testified that the model has shortcomings, but failed to present convincing evidence that the model predictions are not substantially valid.

Because the groundwater flow model is only an approximation of a complex and partially understood flow system, the estimates of interbasin flow and drawdown cannot be considered as absolute values. However, the modeling evidence does strongly suggest that the proposed mine pumping under these applications will not measurably decrease subsurface groundwater flow from Kobeh to Diamond Valley and will not cause significant water level decline (less than 2 feet over entire mine life) at the points of diversion under existing water rights in Diamond Valley. The State Engineer finds the Applications will not conflict with existing rights in Diamond Valley by reducing the subsurface interbasin flow into the Diamond Valley hydrographic basin. Groundwater drawdown in Diamond Valley is not unreasonable at the locations of existing water rights and domestic wells, and meets the statutory requirements of NRS § 534.110. The State Engineer finds the applications will not conflict with existing rights or the protectable interest in domestic wells in Diamond Valley.

The Applicant's groundwater flow model indicates water level decline attributable to these applications is significant in the well field area in Kobeh Valley and at the open pit mine. The Applicant's water level drawdown maps only show drawdown of ten feet

<sup>49</sup> Exhibit 39, Groundwater flow model output data, December 2010.

<sup>50</sup> Transcript, p. 686, December 2010.

<sup>51</sup> Exhibit No. 402, December 2010.

<sup>52</sup> Exhibit No. 503, December 2010.

<sup>53</sup> Transcript, pp. 619-621, December 2010.



or more,<sup>54</sup> although the data files contain detailed information on drawdown to the fractions of a foot.<sup>55</sup> Many of the Protestants argued that water level declines of less than ten feet can cause impacts to surface waters in springs and streams, both in the mountains and on the valley floors. They point out that the model predicts drawdown of the water table below Henderson and Vinini Creeks and along the lower reaches of Roberts Creek. Since Henderson Creek is included in the Pete Hanson Creek Decree, they argue that these applications should be denied because they would conflict with existing rights. The Applicant's expert witnesses argue that these mountain springs and streams are not hydrologically connected to the saturated aquifer.<sup>56</sup> They argue that an unsaturated zone lies between these springs and streams and the aquifer; therefore, the relative level of the water table, so long as it is disconnected from the surface water feature, is immaterial, and no amount of decline in the water table could affect surface flows. This argument of the Applicant's expert witnesses is technically sound and is accepted by the State Engineer. In the testimony of Katzer, he refers to water levels in wells adjacent to Robert's Creek that demonstrate a disconnection between Robert's Creek and the groundwater aquifer that would prevent any decrease in stream flow due to the proposed pumping.<sup>57</sup> However, similar data is not available for Henderson and Vinini Creeks. Nevertheless, in the Henderson Creek area, Mr. Katzer argues that springs and streamflow are simply runoff from precipitation and draining of saturated soil, and are not directly connected to the groundwater aquifer. He argues that they are perched waters and similar to the Robert's Creek argument, could not be affected by a lowered water table. Mr. Katzer was asked about the depth to the water table relative to Henderson Creek and he stated that lower parts of Henderson Creek are probably close to the water table, but it would require drilling of monitor wells to know for certain.<sup>58</sup> As discussed above, the only way groundwater pumping could affect streamflow would be if the water table was in direct contact with the stream bed. It is important to note here that predicted groundwater level decline along Henderson Creek due to future agricultural pumping in Diamond Valley is greater than the predicted water level decline due to

<sup>54</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-16, December 2010.

<sup>55</sup> Exhibit No. 30, groundwater flow model digital data, December 2010.

<sup>56</sup> Testimony of Katzer and Smith, Transcripts, December 2010.

<sup>57</sup> Exhibit No. 38, pp. 3-4, December 2010.

<sup>58</sup> Transcript, pp. 213-214, December 2010.

proposed mine pumping.<sup>59</sup> The State Engineer accepts the expert opinions of the Applicant that mine pumping is unlikely to affect streamflow in Roberts, Henderson or Vinini Creek and finds that the applications will not conflict with existing rights on those streams. However, because there are uncertainties with respect to the complex hydrogeology of the area and the ability of a model to accurately simulate future effects of pumping, the State Engineer will require a substantial surface and groundwater monitoring program to establish baseline groundwater and stream flow conditions to improve the predictive capability of the model and to increase the ability to detect future changes in the hydrologic regime.

Protestant Eureka County presented a comprehensive case with numerous witnesses and accompanying exhibits. In the 2008 hearing, Eureka County focused much of its argument on potential conflicts with Diamond Valley water rights. In the 2010 hearing, Eureka County stressed conflicts with existing rights in Kobeh and Pine Valleys. As discussed above, the State Engineer has found the applications will not conflict with existing rights in either Diamond or Pine Valley. Eureka County witnesses included the owners of the three largest ranches in the well field area in Kobeh Valley. Witnesses included Martin Etcheverry, owner of the Roberts Creek Ranch, Jim Etcheverry, owner of the 3-Bar Ranch, and John Colby, owner of the MW Cattle Company and the Santa Fe/Ferguson grazing allotment. Those three ranchers utilize available surface waters across the grazing allotments and own a variety of surface and groundwater rights in Kobeh Valley. The groundwater flow model predicts water table drawdown at the end of mine life of three feet or more in the general area of Kobeh Valley north of U.S. Highway 50 and east of 3-Bars Road. This includes the well field area, where drawdown is extensive. Drawdown of ten feet or less extends westerly to the Bobcat Ranch and southerly to the Antelope Valley boundary. Water rights that could potentially be impacted are those rights on springs and streams in hydrologic connection with the water table. That would include valley floor springs. Testimony from the Applicant's expert witnesses Katzer and Childress argue that faults at the base of the Robert's Mountains act as barriers to hydrologic flow and that surface water rights in the Roberts Mountains will not be impacted by proposed mine pumpage.<sup>60</sup> There was no expert testimony or

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<sup>59</sup> Exhibit No. 39, Groundwater flow model output data, December 2010.  
<sup>60</sup> Transcript, pp. 169-177 and 227-260.

evidence submitted that indicates surface water rights in the Simpson Park Mountains would be impacted by the proposed applications. In Eureka County's Exhibit Nos. 526, 527, 529 and 530, numerous spring and stream water rights are shown. 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.<sup>61,62</sup> These springs produce less than one gallon per minute and provide water for livestock purposes.<sup>63</sup> The State Engineer finds that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur. To ensure funding exists for any required future mitigation, including mitigation after the cessation of active mining activities, the Applicant must demonstrate the financial capability to complete any mitigation work necessary in a monitoring, management, and mitigation plan. This monitoring, management, and mitigation plan must be approved by the State Engineer prior to diverting any water under these applications.

#### VII. PUBLIC INTEREST

Nevada Revised Statute § 533.370(5) provides that the State Engineer must reject an application if the proposed use of the water threatens to prove detrimental to the public interest. The State Engineer has found that the Applicant has demonstrated a need for the water and a beneficial use for the water and it does not threaten to prove detrimental to the public interest to allow the use of the water for reasonable and economic mining and milling purposes as proposed. The Applicant has acquired about 16,000 afa of existing water rights within Kobeh Valley and requires 11,300 afa for its project. The Applicant has confirmed its commitment to developing this project, has demonstrated the ability to finance the project, and will be required to monitor any groundwater development. Water level drawdown due to simulated mine pumping is thoroughly documented.<sup>64</sup> Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. In regards to the importance of mining, Protestant Eureka County testified that mining is a life blood of

<sup>61</sup> Transcript, pp. 163 and 187, December 2010.

<sup>62</sup> Exhibit No. 39, pp. 189-190, December 2010.

<sup>63</sup> Exhibit No. 116, Appendix B, October 2008.

<sup>64</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-17, and groundwater flow model data files, December 2010.

Eureka County<sup>65</sup> and that Eureka County has and always will be a mining and agricultural county.<sup>66</sup> In addition, Protestant Eureka County indicated that the mine will provide an economic benefit in the form of increased employment and tax revenue for the county.<sup>67</sup> The State Engineer finds under these facts and circumstances the proposed use of the water does not threaten to prove detrimental to the public interest.

#### VIII.

#### STATUTORY STANDARD FOR INTERBASIN TRANSFERS

Nevada Revised Statute provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (a) whether the applicant has justified the need to import the water from another basin; (b) if the State Engineer determines a plan for conservation is advisable for the basin into which the water is imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (c) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) whether the proposed action is an appropriate long-term use, which will not unduly limit the future growth and development in the basin from which the water is exported; and (e) any other factor the State Engineer determines to be relevant. NRS § 533.370(6).

The Applicant is requesting an interbasin transfer of groundwater from both Kobeh Valley and Diamond Valley to a place of use that includes portions of the Kobeh Valley, Diamond Valley and Pine Valley Hydrographic Basins.

#### IX.

#### OTHER RELAVANT FACTORS

In Diamond Valley, the Applicant has acquired existing water rights and the water sought for transfer in this ruling totals about 616 afa (about 385 afa when adjusted for consumptive use reduction). This water is primarily needed to account for inflow of water into the mine pit. All applications in Diamond Valley (Applications 76005-76009, 76802-76805, and 78424) seek to change existing water rights acquired by the Applicant; no new water appropriations are being sought within the Diamond Valley Hydrographic Basin. Whether the groundwater is fully developed under the existing water rights or under the proposed changes to point of diversion, place of use and manner of use, there would be no increase in demand on the groundwater resource in Diamond Valley.

<sup>65</sup> Transcript, p. 715, December 2010.

<sup>66</sup> Transcript, p. 438, October 2008.

<sup>67</sup> Transcript, pp. 438-439, October 2008.

A review of the Diamond Valley Hydrographic Basin shows that there are more committed groundwater rights in the form of permits and certificates than the estimated perennial yield of the basin, while the Kobeh Valley Hydrographic Basin has excess groundwater available for this project. Unless additional restrictions are put in place through permit terms, a situation could exist where water from an over-allocated basin could be exported to a basin that is under-allocated and the State Engineer finds that this would be contrary to the proper management of the Diamond Valley Hydrographic Basin's groundwater resource at this time. The State Engineer finds that any permit issued for the mining project with a point of diversion within the Diamond Valley Hydrographic Basin must contain permit terms restricting the use of water to within the Diamond Valley Hydrographic Basin and any excess water produced that is not consumed within the basin must be returned to the groundwater aquifer in Diamond Valley. The State Engineer finds that any approval of Applications 76005-76009, 76802-76805, and 78424 will restrict the use of any groundwater developed to within the Diamond Valley Hydrographic Basin; therefore, there will be no interbasin transfer of water allowed and NRS § 533.370(6) will not be applicable to these applications.

#### X.

#### NEED TO IMPORT WATER

The interbasin transfer criteria were adopted in 1999. The impetus for the legislation was the proposed transfer of groundwater from rural hydrographic basins in eastern Nevada to the greater Las Vegas area to meet anticipated municipal growth; however, there is no exclusionary language for other manners of use. The requirements of NRS § 533.370(6) along with other statutory criteria are addressed in the following sections.

The groundwater developed for the project will come primarily from a well field located within Kobeh Valley. The mine project area straddles the basin boundary between Diamond Valley and Kobeh Valley and the proposed place of use also encompasses a small portion of Pine Valley. The Applicant presented evidence of its water requirements necessary to operate the project. Water use estimates were made for the operation of the mill and other ancillary uses such as dust control and potable water

supply.<sup>68</sup> The maximum water demand for the project is estimated at 7,000 gpm or about 11,300 afa, which is the amount of water requested by the Applicant.<sup>69</sup>

The Mt. Hope mine straddles the Diamond Valley - Kobeh Valley basin boundaries. The amount of water needed to dewater the pit is less than ten percent of the amount needed for the entire mining operation. Most of the groundwater will be used in the mine's milling circuit. The mill is to be located within Diamond Valley and the tailings storage facility is to be located within Kobeh Valley. Water in the tailings facility will then evaporate from the tailings, be recycled back to the mill, or permanently stored in the tailings facility. A review of the Kobeh Valley Hydrographic Basin shows that there is sufficient unappropriated groundwater to satisfy the demands of the mining project without exceeding the perennial yield of Kobeh Valley. The State Engineer finds that the Applicant has justified the need to import water to Diamond Valley from points of diversion located within the Kobeh Valley Hydrographic Basin.

#### **XI. PLAN FOR CONSERVATION OF WATER**

If the State Engineer determines a plan for conservation is advisable for the basin into which the water is imported, the State Engineer shall consider whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out. Since July 1, 1992, water conservation plans are required for any supplier of municipal and industrial water uses based on the climate and living conditions of its service area.<sup>70</sup> The provisions of the plan must apply only to the supplier's property and its customers. The Applicant is not a municipal supplier of water, there are no municipal and industrial purveyors in Kobeh Valley or Pine Valley and the Applicant does not own or control the municipal water supply to the Town of Eureka in Diamond Valley or any other municipal or quasi-municipal water supply. Eureka County has a water conservation plan on file in the Office of the State Engineer for the Town of Eureka Water System, Devil's Gate GID District #1 and District #2, and Crescent Valley Town Water System.<sup>71</sup> The Applicant

<sup>68</sup> Transcript, pp. 564-571, October 2008; Exhibit Nos. 105, 108 and 112, October 2008.

<sup>69</sup> Transcript, p. 106, December 2010.

<sup>70</sup> NRS § 540.131.

<sup>71</sup> Eureka County - Joint Water Conservation Plan for Town of Eureka Water System, Devil's Gate GID District #1 and District #2, and Crescent Valley Town Water System, official records in the Office of the State Engineer.

will use proven molybdenum mining and milling technologies that will conserve water through reuse and recycling methods.<sup>72</sup>

The State Engineer has considered this statutory provision and hereby determines that requiring additional plans for water conservation is not necessary.

## XII. ENVIRONMENTALLY SOUND

The interbasin transfer statute requires a determination of whether the use of water as proposed under the applications is environmentally sound as it relates to the basin from which the water is exported. The words environmentally sound have intuitive appeal, but the public record and discussion leading up to the enactment of NRS § 533.370(6)(c) do not specify any operational or measureable criteria for use as the basis for a quantitative definition. This provision of the water law provides the State Engineer with no guidance as to what constitutes the parameters of "environmentally sound;" therefore, it has been left to the State Engineer's discretion to interpret the meaning of environmentally sound.

The legislative history of NRS § 533.370(6)(c) shows that there was minimal discussion regarding the term environmentally sound. However, the State Engineer at that time indicated to the Subcommittee on Natural Resources that he did not consider the State Engineer to be the guardian of the environment, but rather the guardian of the groundwater and surface water. The State Engineer noted that he was not a range manager or environmental scientist. Senator Mark A. James pointed out that by the language 'environmentally sound' it was not his intention to create an environmental impact statement process for every interbasin water transfer application and that the State Engineer's responsibility should be for the hydrologic environmental impact in the basin of export.<sup>73</sup>

The State Engineer finds that the meaning of 'environmentally sound' for basin of origin must be found within the parameters of Nevada water law and this means that whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources. The State Engineer finds that in consideration of

<sup>72</sup> Transcript, p. 118, December 2010.

<sup>73</sup> Nevada Legislature Seventieth Session, *Summary of Legislation*, Carson City, Nevada: 1999, Web, Mar. 2, 2011. <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHa/1999/SB108,1999.pdf>

whether a proposed project is environmentally sound there can be a reasonable impact on the hydrologic related natural resources in the basin of origin.

Existing water rights in Kobeh Valley, not owned or controlled by the Applicant, total around 1,100 afa, and if the water for the project is approved the committed groundwater resource from the basin would be about 12,400 afa, which is far less than the perennial yield of the Kobeh Valley Hydrographic Basin. A review of records in the Office of the State Engineer show that there are 71 water-righted springs within the Kobeh Valley Hydrographic Basin. Of these 71 water rights, 29 are un-adjudicated claims of reserved water right filed by the United States Bureau of Land Management (BLM). The BLM was a protestant to the initial applications in this matter, but withdrew its protests after reaching a stipulation on monitoring, management and mitigation with the Applicant. The State Engineer finds that none of the remaining water rights are owned by any of the Protestants in this matter. Most of the remaining springs are either located far away from the proposed well sites or will not be affected due to topography and geology. However, the Applicant's groundwater model does indicate that there may be an impact to several small springs located on the valley floor of Kobeh Valley near the proposed well locations. These small springs are estimated to flow less than 1 gallon per minute.<sup>74</sup> Because these springs exist in the valley floor and produce minimal amounts of water, any affect caused by the proposed pumping can be easily mitigated such that there will be no impairment to the hydrologic related natural resources in the basin of origin. The monitoring, management and mitigation plan will allow access for wildlife that customarily uses the source and will ensure that any existing water rights are satisfied to the extent of the water right permit.

The State Engineer finds that the Applicant is only requesting 11,300 afa for its mining project, which when combined with other existing water rights is less than the perennial yield of the Kobeh Valley Hydrographic Basin. The State Engineer finds that prior to the October 2008 hearing, the Applicant had acquired about 16,000 afa of previously permitted or certificated groundwater rights within the Kobeh Valley Hydrographic Basin. The State Engineer finds that the required monitoring, management and mitigation plan, that must be approved prior to the pumping of water for the project,

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<sup>74</sup> Exhibit No. 116, Appendix B, October 2008.



will ensure that the proposed interbasin transfer of groundwater from the Kobeh Valley Hydrographic Basin remains environmentally sound throughout the life of the project.

**XIII.  
LONG-TERM USE OF THE WATER AND FUTURE GROWTH AND  
DEVELOPMENT IN THE BASIN OF ORIGIN**

Nevada has been known for containing vast deposits of minerals located throughout the state and mining has been a predominant economic force in Nevada since before statehood. Due to the availability of those mineral deposits, mining is one of the larger industries in Nevada and has traditionally provided many high-paying jobs for local communities and has contributed to the communities in other ways such as investing in infrastructure and services for those communities. It has had such an impact that the Nevada legislature declared mining and related activities to be recognized as a paramount interest of the state.<sup>75</sup> Mining operations are highly regulated by numerous governmental entities at the state and federal levels, including but not limited to regulation by Congress, the Secretary of Agriculture, the Secretary of the Interior, the United States Bureau of Land Management, the United States Forest Service, and the Nevada Department of Conservation and Natural Resources, which includes the Nevada Division of Environmental Protection, the Nevada Division of Minerals and the Nevada Division of Water Resources.

The proposed mining project is located within Eureka County. Eureka County's protest states in part:

Eureka County recognizes that the custom and culture of mining is part of its history and appreciates the role mining plays in its local and regional economy. Eureka County welcomes new opportunity for mining in its communities as long as mine development is not detrimental to existing economic or cultural activity. This protest is aimed at ensuring that any development of water resources in Kobeh Valley is conducted in full accordance with Nevada law, the Eureka County Master Plan and related ordinances, and does not unduly threaten the health and welfare of Eureka County citizens.<sup>76</sup>

Protestant Eureka County presented testimony that there could potentially be mining-related projects and other activities in Kobeh Valley as an example of future growth that may occur in Kobeh Valley; however, no water right applications have been

<sup>75</sup> NRS § 37.010 (f)(1).

<sup>76</sup> Exhibit No. 509, December 2010.

filed on these potential projects.<sup>77</sup> Protestant Eureka County also argues that the population of southern Eureka County may increase from 940 to over 2,000, although that includes an estimated 700 people from the mine assuming the Mount Hope project proceeds as planned.<sup>78</sup> A review of pumpage records submitted to the Office of the State Engineer shows that the Town of Eureka currently reports a usage of about 175 afa out of about 1,226 afa of available water rights.<sup>79</sup> It should be noted that there are no permitted municipal or quasi-municipal water users in the basin of origin, Kobeh Valley. The only existing groundwater uses permitted at this time in Kobeh Valley are mining and milling, irrigation, and stock watering.

The State Engineer finds that the water sought for appropriation in Kobeh Valley is less than the estimated perennial yield of the basin; therefore, substantial water remains within the basin for future growth and development. The State Engineer finds that the project will not unduly limit the future growth and development in the Kobeh Valley Hydrographic Basin. The State Engineer finds that the proposed mining project is the type of future growth and development that would be anticipated in this area of Nevada. The State Engineer finds that mining provides an economic base for Eureka County.

#### XIV. FORFEITURE

The Applicant has filed applications to change existing water rights. Once a certificate of appropriation for groundwater is issued, the owner is subject to the provisions of NRS § 534.090, which provides in part that the water right may be subject to forfeiture after five consecutive years of nonuse.<sup>80</sup>

Protestant Eureka County provided testimony and evidence regarding the alleged forfeiture of the following water right certificates; note, the associated change application(s) is in parentheses: Certificates 2780 (App. 76989, 79223), 2880 (App. 76990, 79935), 2782 (App. 76483), 6457 (App. 76484, 77174), 8002 (App. 76485, 77175), 8003 (App. 76486) and 4922 (App. 76744). The certificates are associated with three separate areas:

<sup>77</sup> Transcript, pp. 749 and 750 and Exhibit No. 531, December 2010.

<sup>78</sup> Transcript, pp. 703 and 704, December 2010.

<sup>79</sup> See, Permit No. 76526, total combined duty of water not to exceed 1,226.22 afa, official records in the Office of the State Engineer.

<sup>80</sup> NRS § 534.090.

1. Bartine a.k.a. Fish Creek Ranch
  - a. Certificate 2780 (Permit 9682)
  - b. Certificate 2880 (Permit 11072)
2. Willow a.k.a. 3F Ranch
  - a. Certificate 2782 (Permit 10426)
  - b. Certificate 6457 (Permit 18544)
  - c. Certificate 8002 (Permit 23951)
  - d. Certificate 8003 (Permit 23952)
3. Bean Flat a.k.a. Damele Ranch
  - a. Certificate 4922 (Permit 13849)

All certificates were issued for irrigation and/or domestic purposes and the testimony and evidence indicates extensive periods of non-use. The Division has conducted crop inventories in Kobeh Valley and records from those pumpage inventories from 1983 to 2007 were introduced at the hearing.<sup>81</sup> The following is a summary of the crop inventories that are available. There is no inventory data for any omitted years in the following Table 1.

| Ranch & Cert./Year   | 1984 | 1985 | 1986 | 1993 | 1995 | 1998 | 2002 | 2003 | 2004 | 2005 | 2006  | 2007  | 2008 | 2010 |
|----------------------|------|------|------|------|------|------|------|------|------|------|-------|-------|------|------|
| Bartine Cert. 2780   |      |      |      |      |      |      |      |      |      |      | 65.54 | 65.54 | 15   | 59.5 |
| Bartine Cert. 2880   |      |      |      |      |      |      | 20   | 20   | 20   | 20   | 0     | 0     | 45   | 45   |
|                      |      |      |      |      |      |      |      |      |      |      |       |       |      |      |
| Willow Cert. 2782    |      |      |      |      |      |      |      |      |      |      | 0     | 0     | 0    | 0    |
| Willow Cert. 6457    | 0    | 0    | 0    | 0    | 0    |      |      |      |      |      | 0     | 0     | 0    | 0    |
| Willow Cert. 8002    | 0    | 0    | 0    | 0    | 0    | 0    |      |      |      |      | 0     | 0     | 0    | 0    |
| Willow Cert. 8003    |      |      |      |      |      |      |      |      |      |      | 0     | 0     | 0    |      |
|                      |      |      |      |      |      |      |      |      |      |      |       |       |      |      |
| Bean Flat Cert. 4922 |      |      |      |      |      |      |      |      |      |      | 0     | 0     | 0    | 0    |

Table 1. Crop inventory summary (acres).

For the Bartine a.k.a. Fish Creek Ranch, the crop inventories indicate some usage of water in recent years. The Protestant has argued that the water is not used for active irrigation, rather the water flows uncontrolled from artesian wells on an area of pasture land and no crop has been planted and/or harvested; therefore, this use should not be counted as beneficial use as noted on the crop inventories. There was substantial

<sup>81</sup> Exhibit No. 29, October 2008.

testimony stating that there was no irrigation of a crop on the property,<sup>82</sup> but most of the witnesses appeared to agree that there was some artesian flow of water on the property. Certificate 2780 indicates that the proposed works include an artesian well, supporting structures and a small ditch. Certificate 2880 indicates that the proposed works consists of a groundwater well providing water to ditches. Both certificates irrigate the same acreage being 65.54 acres of land and are supplemental to each other by place of use. The crop inventories credit the entire acreage as irrigated pasture grass from an artesian well in 2006 and 2007, as seen in Table 1. The Protestant makes an argument that the artesian flow does not comply with the intent of the Certificates, does not constitute a beneficial use of water, and does not meet the definition of irrigate or irrigation water. However, because the Protestant's evidence of non-use conflicts with the 2006 and 2007 crop inventories, which show use on the entire place of use of 65.54 acres, and substantial use in 2008 and 2010, the State Engineer finds that there is not clear and convincing evidence of forfeiture for Certificates 2780 and 2880.

For the Willow Ranch, a.k.a. 3F Ranch, four witnesses testified that there has been no water use or irrigated land under the certificates, since the early 1980s, or at least 1989.<sup>83</sup> The witnesses consist of a resident who has hauled hay in the general area for 32 years and had assisted in harvesting crops on the ranch in 1980, a long-time resident that drove the area at least once a month between 1994-2003, the current Chairman of the Eureka County Board of Commissioners who was also the County Assessor for thirty years and visited the properties every five years as Assessor, and the Public Works Director for Eureka County who is a long-time resident and for a seven-year period was road superintendent. The available crop inventories corroborate the testimony of the witnesses as illustrated in Table 1. A review of the record shows no evidence was provided at the administrative hearing as to water use on the ranch from at least 1989 to 2010.

The evidence demonstrates that the water represented by Certificates 2782, 6457, 8002, and 8003 has not been placed to beneficial use for a period of time in excess of more than the statutory five-year period necessary to work a forfeiture. The State

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<sup>82</sup> Transcript, pp. 117, 118, 401, 423 and 484, October 2008.

<sup>83</sup> Transcript, pp. 113-114, 402, 422, 423 and 485, October 2008.

Engineer finds that the water under Certificates 2782, 6457, 8002 and 8003 is subject to forfeiture.

For Bean Flat, a.k.a. Damele Ranch, the crop inventories show no water use in 2006, 2007, 2008 and 2010.<sup>84</sup> Aerial photos from 1954, 1975 and 1981 compared to Google Earth today show no differences in the area and it appears the area has not changed significantly since at least 1954.<sup>85</sup> The Protestant's witness concluded that his review of the crop inventories and aerial photos show no beneficial use of water on this property.<sup>86</sup> The former Eureka County Assessor also testified that during his assessment duties he had never seen any water used for irrigation purposes at the ranch.<sup>87</sup> The evidence demonstrates that the water represented by Certificate 4922 (Permit 13849) has not been placed to beneficial use for more than the statutory five-year period necessary to work a forfeiture. The State Engineer finds that the water under Certificate 4922 is subject to forfeiture.

#### XV. CROP CONSUMPTIVE USE

The State Engineer defines the consumptive use of a crop as that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to non-recoverable water vapor, or otherwise does not return to the waters of the state. Consumptive use does not include irrigation inefficiencies or waste. The net irrigation water requirement of a crop is equal to the consumptive use of the crop less the amount of effective precipitation that falls on the crop. Therefore, the net irrigation water requirement is the amount of the crop's consumptively used water that is provided by the water right, and is the quantity considered under NRS § 533.3703 in allowing for the consideration of a crop's consumptive use in a water right transfer.

The State Engineer's consumptive use estimate for the Kobeh Valley and Diamond Valley Hydrographic Basins is based on the Penman-Monteith short reference evapotranspiration and dual-crop coefficient approach for estimating crop evapotranspiration, similar to methods described by the American Society of Civil

<sup>84</sup> Crop/pumpage/well measurement data for Kobeh Valley (139), official records in the Office of the State Engineer.

<sup>85</sup> Transcript, pp. 169-170 and Exhibit No. 29, October 2008.

<sup>86</sup> Transcript, p. 171, October 2008.

<sup>87</sup> Transcript, p. 424, October 2008.

Engineers,<sup>88</sup> Food and Agriculture Organization of the United Nations,<sup>89</sup> and Allen et al., (2005).<sup>90</sup> Net irrigation water requirement estimates for each of Nevada's Hydrographic Basins are listed in the Evapotranspiration and Net Irrigation water Requirements for Nevada.<sup>91</sup> For Koebe Valley, the State Engineer finds that the net irrigation water requirement of both alfalfa and highly-managed pasture grass is estimated to be 2.7 feet per year. For Diamond Valley, the State Engineer finds that the net irrigation water requirement of both alfalfa and highly-managed pasture grass is estimated to be 2.5 feet per year.

#### XVI. GEOLOGIC ARGUMENT OF CHAMBERLAIN

Dr. Chamberlain is Protestant Cedar Ranches, LLC (Cedar), and testified on his own behalf and as the expert witness for Lloyd Morrison at the October 2008 hearing. Dr. Chamberlain was qualified as an expert in geology and as a petroleum geologist for the purposes of the 2008 hearing. Cedar Ranches is a Protestant to change Applications 76744, 76745, and 76746 in Koebe Valley. The crux of this Protestant's argument was that the existing published geologic data is not adequate and without an accurate geologic model it is impossible for the Applicant to develop a hydrologic model of the area.<sup>92</sup> A computer slide presentation was submitted in support of the Protestant's geologic theory and a shortened version of the presentation was given at the hearing.<sup>93</sup> The Protestant provided an exhibit for the December 2010 hearing, but as the Protestant did not appear at that hearing, the exhibit was not offered or admitted.

A review of the prior hearing testimony shows that the Protestant did a substantial amount of work as a petroleum geologist for the Placid Oil Company.<sup>94</sup> The Protestant also formed the Cedar Stratigraphic Corporation to generate geologic data for oil companies to use in their exploration programs.<sup>95</sup>

<sup>88</sup> State Engineer's Office, *The ASCE Standardized Reference Evapotranspiration Equation*, 2005.

<sup>89</sup> State Engineer's Office, *Crop Evapotranspiration: Guidelines for Computing Crop Water Requirements*, FAO Irrigation and Drainage Paper No. 56, 1998.

<sup>90</sup> State Engineer's Office, Allen, R.G., Pereira, L.S., Smith, M., Raes, D., and Wright, J.L., *FAO-56 Dual Crop Coefficient Method for Estimating Evaporation from Soil and Application Extensions*, Journal of Irrigation and Drainage Engineering, 2005, pp. 131(1), 2-13.

<sup>91</sup> *Evapotranspiration and Net Irrigation water Requirements for Nevada*, Huntington and Allen, 2010, available online at [http://water.nv.gov/mapping/et/et\\_general.cfm](http://water.nv.gov/mapping/et/et_general.cfm)

<sup>92</sup> Transcript, p. 54, October 2008.

<sup>93</sup> Exhibit Nos. 75 and 84, October 2008; Transcript, pp. 49-93, October 2008.

<sup>94</sup> Transcript, p. 57, October 2008.

<sup>95</sup> Transcript, p. 53, October 2008.

The Protestant presented the results of some of the geological studies he has completed over the years; however, most of the studies were outside of the project area at issue in this case and their relevance appears tenuous at best.<sup>96</sup> One of his major points is that there is a hydrologic connection between Diamond Valley and Kobeh Valley, and that pumping in Kobeh Valley could impact water levels in Diamond Valley. The Protestant concluded by stating, "...this presentation establishes that an accurate geologic model is critical for the applicants to create an accurate hydrologic model..." and "[a]n accurate hydrologic model is necessary because the geology demonstrates there are huge horizontal and vertical conduits for the transfer of water from Diamond Valley to Kobeh Valley."<sup>97</sup> The existence of a hydrologic connection between Kobeh and Diamond Valleys, or between numerous other basins in the Diamond Valley Flow System, is generally accepted by hydrologists and the State Engineer. The Protestant provided documents stating, "Neither the State Engineer nor the BLM have the knowledge or necessary data to make major responsible resource or land use decisions concerning the eastern Great Basin Aquifer."<sup>98</sup> "The State of Nevada has yet to conduct a detailed and accurate State Geological Survey for proper land and resource decisions can be made."<sup>99</sup> "Meanwhile, Cedar Strat has already initiated a proprietary Great Basin Geological Survey that can be used for land and resource decisions and natural resource exploration."<sup>100</sup> "Cedar Strat's Great Basin Geological Survey has been recently valued at more than \$850 MM but it has only begun the work that needs to be done."<sup>101</sup>

The State Engineer finds the Protestant did not appear at the hearing on remand to support his protest. The State Engineer finds the basin and range extensional tectonics in the Great Basin is widely accepted by the scientific community in every peer-reviewed publication analyzed by the Office of the State Engineer and cannot be discounted based on this lone Protestant's contrary interpretation. The State Engineer finds that the Protestant is not an expert in hydrology or hydrogeology and any testimony or evidence provided by the Protestant in those areas of study carry no weight. The State Engineer

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<sup>96</sup> Exhibit Nos. 75 and 84, October 2008; Transcript, pp. 49-93, October 2008.

<sup>97</sup> Transcript, p. 92, October 2008.

<sup>98</sup> Exhibit No. 75, October 2008.

<sup>99</sup> Exhibit No. 75, October 2008.

<sup>100</sup> Exhibit No. 75, October 2008.

<sup>101</sup> Exhibit No. 75, October 2008.

finds that the Protestant failed to provide substantial evidence and testimony in support of his protests.

#### **XVII OTHER PROTEST ISSUES**

Nevada Revised Statute § 533.370(5) provides that the State Engineer shall reject an application where the proposed use conflicts with existing water rights. Witnesses testified to their various concerns primarily related to their respective water rights, business, farming, ranching and county interests.

The Eureka Producers Cooperative withdrew all protests prior to the remand hearing after reaching an agreement with the Applicant in August 2010. Lander County did not present a case at the December 2010 hearing. Tim Halpin, Lloyd Morrison and Cedar Ranches were represented by one attorney and presented a joint case at the 2008 hearing. Tim Halpin reached an agreement with the Applicant and withdrew his protests prior to the December 2010 hearing. Cedar Ranches did not attend the December 2010 hearing and did not present a case on remand.

Protestant Tackett attended the December 2010 hearing and indicated in testimony that he owns Klobe Hot Springs in the Northern part of Antelope Valley, south of Kobre Valley, and expressed concern that the entire Diamond Valley flow system was not studied in its entirety. He asked that the Klobe Hot Springs be part of any monitoring efforts to protect his existing rights.<sup>102</sup> The State Engineer finds that the entire flow system has been considered, specifically in 'Findings Section V.' of this ruling, and a monitoring, management and mitigation plan will be required. The State Engineer finds that the predicted groundwater drawdowns in the area of Klobe Hot Springs to be minimal to non-existent and no affects on the Hot Springs area are predicted.<sup>103</sup>

Lloyd Morrison testified on his own behalf and raised concerns over impacts to his existing water rights. His property is located on the west side of Diamond Valley and is one of the closest properties to the proposed mine pit. He believes that a concise monitoring, management and mitigation plan must be in place before the permits are granted.<sup>104</sup> The State Engineer finds that an approved monitoring, management and mitigation plan will be required prior to diversion of water for the project. The State

<sup>102</sup> Transcript, pp. 814-830, December 2010.

<sup>103</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-16, December 2010.

<sup>104</sup> Transcript, pp. 428-430, December 2010.



Engineer has previously found, based on the scientific evidence, that there will be an impact of less than 2 feet on the water table at Mr. Morrison's wells in Diamond Valley due to the mine's proposed pumping. The State Engineer finds that this amount of drawdown over the 44-year life of the mine is not unreasonable and will not conflict with the Protestant's existing water rights.

Protestant Benson, through witness and son Craig Benson, offered testimony that the water level has been falling at a fairly steady rate of decline in Diamond Valley at the Benson agricultural properties.<sup>105</sup> He asked that the State Engineer consider impacts to the entire flow system and to existing rights in Diamond Valley.<sup>106</sup> The State Engineer finds that the entire flow system and impacts to existing rights are addressed throughout this ruling. Protestant Benson personally testified at the hearing of October 13-17, 2008, and again at the December 2010 hearing. Protestant Benson indicated that the water level in one of his wells has dropped 69 feet over a period of 49 years or about 1.4 feet per year.<sup>107</sup> The State Engineer finds that water level decline at Mr. Benson's well is due to agricultural pumping within Diamond Valley, and has found earlier in this ruling that there will not be unreasonable impacts to his water rights due to proposed mine pumping.

Protestant Conley testified that he acquired his property in Diamond Valley in 2007 and the water level has declined about two feet per year since that time.<sup>108</sup> Protestant Conley also believes pumping under these applications will have an adverse impact on his existing water rights. This claim is based on his belief in a hydrologic connection between Kobeh Valley and Diamond Valley. Protestant Conley stated that he believed the mine project should have acquired water from active water permits in Diamond Valley.<sup>109</sup> The Applicant has acquired 16,000 afa of existing water rights in Kobeh Valley and is seeking to develop 11,300 afa of water from the Kobeh Valley aquifer. The Applicant has also acquired substantial amounts of existing groundwater rights within Diamond Valley. A review of the record shows that the Applicant has justified the need for 11,300 afa of water from Kobeh Valley. The committed resources of the Kobeh Valley Hydrographic Basin are well below the estimated perennial yield, including the changes and appropriations sought by the Applicant in this ruling. The

<sup>105</sup> Transcript, pp. 771-772, December 2010.

<sup>106</sup> Transcript, p. 778, December 2010.

<sup>107</sup> Transcript, p. 796, December 2010.

<sup>108</sup> Transcript, p. 432, December 2010.

<sup>109</sup> Transcript, p. 437, December 2010.

scientific evidence, including hydrologic studies and groundwater modeling, estimated future effects and this evidence shows that no unreasonable impacts will occur. The State Engineer finds that the applications will not conflict with the Protestant's existing water rights.

#### XVIII.

Protestant Eureka County, through its closing brief, requests that the applications filed by the Applicant be denied because the proposed use or change conflicts with existing rights, a mitigation plan to prevent impacts to existing users has not been provided, the applications propose an interbasin transfer but the applicant has failed to provide evidence to satisfy the statutory requirements for the State Engineer to grant an interbasin transfer, there is a lack of water available to appropriate, and there is a lack of specificity in the applications. However, Protestant Eureka County also spoke in favor of mining.

In its protest, Eureka County states,

Eureka County recognizes that the custom and culture of mining is part of its history and appreciates the role mining plays in its local and regional economy. Eureka County welcomes new opportunity for mining in its communities as long as mine development is not detrimental to existing economic or cultural activity. This protest is aimed at ensuring that any development of water resources in Koebe Valley is conducted in full accordance with Nevada law, the Eureka County Master Plan and related ordinances, and does not unduly threaten the health and welfare of Eureka County citizens.<sup>110</sup>

In testimony, the Eureka County Natural Resource Manager indicated that Eureka County did not want to kill the project but wanted it done right.<sup>111</sup> He indicated that the monitoring, management and mitigation plan was very important and that Eureka County wants full participation in developing the plan.<sup>112</sup> In testimony, the Chairman of the Eureka County Board of Commissioners confirmed that to his knowledge no one representing Eureka County has ever directed its consultants, employees or attorneys to try and kill the mine project.<sup>113</sup> The Chairman indicated that it was his understanding that Eureka County had to protest to maintain standing with the State Engineer and if there is

<sup>110</sup> Exhibit No. 509, December 2010.

<sup>111</sup> Transcript, p. 755, December 2010.

<sup>112</sup> Transcript, p. 756, December 2010.

<sup>113</sup> Transcript, p. 714, December 2010.

not a settlement with the Applicant that the County would be denied the right to participate in a monitoring, management and mitigation plan.<sup>114</sup> The Chairman testified that mining is a life blood of Eureka County<sup>115</sup> and that Eureka County has and always will be a mining and agricultural county.<sup>116</sup> In addition, the mine will provide an economic benefit in the form of increased employment and tax revenue for the county.<sup>117</sup>

While substantial evidence exists that pumping 11,300 afa of water from Koberh Valley, which is considerably less than the revised and more conservative perennial yield of 15,000 afa, can be safely carried out, 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 has wide latitude and broad authority in terms of imposing permit terms and conditions. This includes the authority to require a comprehensive monitoring, management and mitigation plan prepared with assistance from Eureka County.

The State Engineer finds 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.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>118</sup>

#### II.

The State Engineer is prohibited by law from granting an application to appropriate or change the public waters where:<sup>119</sup>

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

<sup>114</sup> Transcript, p. 714 and pp. 716-717, December 2010.

<sup>115</sup> Transcript, p. 715, December 2010.

<sup>116</sup> Transcript, p. 438, October 2008.

<sup>117</sup> Transcript, pp. 438-439, October 2008.

<sup>118</sup> NRS Chapters 533 and 534.

<sup>119</sup> NRS § 533.370(5).

### III.

The evidence and testimony show that select springs on the floor of Kobeh Valley and one domestic well near Roberts Creek may be impacted by the proposed pumping in Kobeh Valley; however, any impacts can be detected and mitigated through a comprehensive monitoring, management and mitigation plan. The State Engineer has found that the domestic well and spring flow reduction can be adequately and fully mitigated by the Applicant should impacts to existing rights or the domestic well occur. To ensure funding exists for any required future mitigation, including mitigation after the cessation of active mining activities, the Applicant must demonstrate the financial capability to complete any mitigation work necessary in a monitoring, management, and mitigation plan prior to pumping groundwater for the project.

Based on substantial evidence and testimony, and the monitoring, management and mitigation plan requirement, the State Engineer concludes that the approval of the applications will not conflict with existing water rights, will not conflict with protectable interests in existing domestic wells as set forth in NRS § 533.024, and will not threaten to prove detrimental to the public interest.

### IV.

The State Engineer concludes the Applicant provided proof satisfactory of its intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence, and its financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

### V.

The State Engineer concludes that based on the findings the Applicant meets the additional statutory criteria required for an interbasin transfer of water from Kobeh Valley under NRS § 533.370(6); therefore, the applications filed within Kobeh Valley can be considered for approval. The State Engineer concludes any groundwater developed in Diamond Valley will be limited to use within Diamond Valley; therefore, the interbasin transfer statute is not applicable to these applications.

VL

Concerns were raised at the administrative hearing that the State Engineer had not provided notice under NRS § 534.090 that the water right might be subject to forfeiture.

Nevada Revised Statute § 534.090 provides:

For water rights in basins for which the State Engineer keeps pumping records, if the records of the State Engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of such a water right which is governed by this chapter, the State Engineer shall notify the owner of the water right, as determined in the records of the Office of the State Engineer, by registered or certified mail that he has 1 year after the date of the notice in which to use the water rights beneficially and to provide proof of such use to the State Engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right.

The argument was raised that the State Engineer was required to notify the holders of the possible forfeiture one year before commencing the forfeiture proceeding. The statutory language quoted above was added to NRS § 534.090 in 1995 as Assembly Bill 435, which became effective on July 1, 1995. Accordingly, any water right for which there was more than five consecutive years of complete or partial non-use on the effective date of the notice provision, July 1, 1995, is not entitled to notice by the express terms of the statute. As to Certificates 2782, 4922, 6457, 8002, and 8003, the water rights had not been used for more than five consecutive years before the notice provision was enacted in 1995. Therefore, the holders of the water right were not entitled to notice of possible forfeiture. Such an interpretation is clear from the express provisions of the statute. The plain language of the statute lends itself to only one possible interpretation: any certificated underground water right or portion of water right that had not been put to beneficial use for five years or more when the notice provision became effective is not entitled to notice. The Applicant's argument can only be accepted if the phrase "but less than 5 consecutive years" is ignored.

Such an interpretation would not only be inconsistent with the express language of NRS § 534.090, but would give retroactive effect to the statute when the legislative history clearly intended the notice provision not apply retroactively. According to Assemblyman Neighbors, one of the sponsors of Assembly Bill 435, "there are not retroactive provisions in [A.B. 435]."<sup>120</sup> In testimony regarding A.B. 435, the State Engineer stated, "this office has

<sup>120</sup> *Hearing on A.B. 435 before the Senate Committee on Natural Resources, 1995 Leg., 68<sup>th</sup> Sess. 2 (June 7, 1995).*

taken the position that if 5 years have already past [sic], those non-users of water rights are not to be notified. Under the measure, it is only the ones where 4 years of non-use of water rights have occurred, but not yet 5."<sup>121</sup> The reason A.B. 435 was not applied to existing rights that had not been used for five years or more was that such a requirement would have placed a tremendous burden on the Office of the State Engineer. The State Engineer commented that "probably 4,000 water rights in the state . . . are subject to forfeiture."<sup>122</sup>

Accordingly, the Legislature understood from one of the drafters of A.B. 435 that the notice provision was not intended to be applied in situations where five years of non-use had already occurred prior to the enactment of the law and thereby resurrect rights that were already subject to forfeiture. Generally, a statute will only be interpreted to have prospective effect unless there is a clear expression of legislative intent that it applies retroactively.<sup>123</sup> Here not only has the Legislature not stated an intention that the notice provision of NRS § 534.090(1) apply retroactively, they specifically indicated in both the language of the statute and the legislative history that the notice provision was not intended to be retroactive.

The State Engineer concludes that since more than five consecutive years of non-use of water under Certificates 2782, 4922, 6457, 8002, and 8003, had passed prior to the enactment of the notice provision of NRS § 534.090, he was not required to provide one-year notice as set forth in NRS § 534.090.

#### VII.

The State Engineer concludes, based on the revised perennial yield of Kobeh Valley compared to committed resource, that the actual withdrawal of groundwater within the basin is well below the perennial yield and water is available for appropriation for the temporary manner of use contemplated under these applications.

#### VIII.

The protests of Eureka County and Benson cite that further applications for the mining project should not be considered until a United States Geological Survey (USGS) study is completed. There is nothing in Nevada water law that requires or compels applications to be held for an indefinite period of time while a third party not associated with the project completes a study of the area. The State Engineer concludes there is

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<sup>121</sup> *Id.* at Sess. 4.

<sup>122</sup> *Ibid.*

<sup>123</sup> See, *Nevada Power Co. v. Metropolitan Development Co.*, 104 Nev. 684, 686, 765 P.2d 1162 (1988).

sufficient existing hydrologic information to proceed with these applications and this protest issue does not provide valid grounds for denial of the applications.

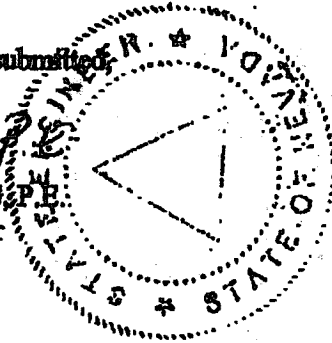
**RULING**

Certificates 2782, 4922, 6457, 8002 and 8003 are hereby declared forfeit; therefore, Applications 76483, 76484, 76485, 76486, 76744, 77174 and 77175 are denied. The remaining protests are overruled and Applications 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, 76802, 76803, 76804, 76805, 76989, 76990, 77171, 77525, 77526, 77527, 77553, 78424, 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 and 79942 are hereby granted subject to:

1. Existing rights;
2. Payment of the statutory permit fees;
3. A monitoring, management, and mitigation plan prepared in cooperation with Butte County and approved by the State Engineer before any water is developed for mining;
4. All changes of irrigation rights will be limited to their respective consumptive uses;
5. No export of water from the Diamond Valley Hydrographic Basin;
6. A total combined duty of 11,300 afa.

Respectfully submitted,

  
JASON KING, P.E.  
State Engineer



Dated this 15th day of  
July, 2011.

## **Attachment 13**



**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.

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<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[ Kobeh 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.

## **Attachment 14**

**Attachment 14**

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